SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1501

J. H. RUTTER REX MANUFACTURING COMPANY, INC.

Petitioner

versus

NATIONAL LABOR RELATIONS BOARD and AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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J. H. RUTTER REX MANUFACTURING COMPANY, INC.

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NATIONAL LABOR RELATIONS BOARD and AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MAY IT PLEASE THE COURT:

J. H. Rutter Rex Manufacturing Company, Inc., petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit which enforced, in part, an order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, pages 1A-45A *infra*) is reported 473 F.2d 223, 82 LRRM 2264 (5th Cir. 1973). The Board's supplemental decision and order are reported at 194 NLRB No. 6 (1971) (Appendix D, pages 50A-73A *infra*).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment of the court of appeals was entered on February 7, 1973. (Appendix B, p. 46A *infra*). On March 12, 1973, the court of appeals denied a timely petition for rehearing *en banc* filed by J. H. Rutter Rex Manufacturing Company, Inc. (Appendix C, p. 49A, *infra*).

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in the light of this Court's opinion in *NLRB v. J. H. Rutter Rex Manufacturing Co.*, 396 U.S. 258 (1969) (Appendix E, pages 74A-85A, *infra*) the court of appeals erred in enforcing the backpay order of the Board without mitigation on the basis of the Board's further delay in presenting the backpay claims.

2. Whether the court of appeals erred in extending the lawyer's work product exemption from discovery of *Hickman v. Taylor*, 329 U.S. 495 (1947) to create a new privilege applicable to the work product of non-lawyer Board personnel.

AUTHORITY AND STATUTES INVOLVED

This case involves interpretation of this Court's opinion in *NLRB v. J. H. Rutter Rex Manufacturing Co.*, 396 U.S. 258 (1969) and application of 29 U.S.C. §160(b) (National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151 et seq) the pertinent provision of which states,

> "(b) . . . Any such [Board] proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United

States, adopted by the Supreme Court of the United States . . ." (Brackets added).

STATEMENT OF THE CASE

This case arises out of a strike which occurred at petitioner's New Orleans, Louisiana plant in April, 1954 and lasted one year. In 1956, the Board concluded that the strike was an unfair labor practice strike and ordered reinstatement of the strikers. *J. H. Rutter Rex Manufacturing Company, Inc.*, 115 NLRB 383 (1956). The Board's order was enforced by the Fifth Circuit on June 10, 1957. The Court stated that the numerous problems inherent in complying with the Board order should be resolved "in further administrative proceedings . . . or in direct contempt proceedings." *NLRB v. J. H. Rutter Rex Manufacturing Company, Inc.*, 245 F.2d 594, 598 (5th Cir. 1957).

Nearly four years later on November 4, 1961, the Board filed a backpay specification (referred to herein as the initial specification). Petitioner sought an injunction against the hearings on the initial specification due to the unreasonable delay of the Board in handling the case. Injunctive relief was denied. *NLRB v. J. H. Rutter Rex Manufacturing Co.*, 305 F.2d 242 (5th Cir. 1962). After hearings in 1962 and 1963, an initial backpay order was issued by the Board. [158 NLRB 1414 (1966)].

On review of the initial proceedings, the Fifth Circuit modified the initial backpay order by terminating petitioner's backpay liability as of July 30, 1959 because of the Board's inordinate delay in concluding the case. The court held that this cutoff reflected a proper balancing of the equities between all parties. *J. H. Rutter Rex Manufacturing Company, Inc. v. NLRB*, 399 F.2d 356 (5th Cir. 1968).

On writ of certiorari, this Court[1] reversed in an opinion expressly limited to ". . . the circumstances of this case." *NLRB v. J. H. Rutter Rex Manufacturing Co.*, 396 U.S. 258, 259 (1969). Chief Justice Burger and Justices Douglas and Harlan dissented, believing that the circuit court had properly approached the case as a problem in ". . . working out the equities of a back-pay order" and that the circuit court had ". . . arrived at its judgment as an exercise of its responsibility 'for assuring that the Board keeps within reasonable bounds' . . . in an area that necessarily involves 'diverse, complicated situations.'" (396 U.S. at p. 267-8) (p. 85A, *infra*).

The initial backpay specification did not consider any claims beyond June 26, 1961. The instant proceeding was initiated on November 30, 1970 by the filing of a supplemental backpay specification claiming additional backpay owed to thirty-three claimants for the period July 1, 1961 through May, 1963 with six claims extending beyond the latter date. This filing was more than 15 years after termination of the strike, more than 13 years after the 1957 enforcing opinion of the circuit court and more than nine years after the initial specification was filed.

During the 1971 hearings before the Board on the supplemental specification, petitioner contended that the additional Board delay between 1961 and 1970 should be taken into account in fashioning a supplemental backpay order. The Board's Trial Examiner rejected this argument stating that this Court's 1969 opinion had answered the argument adversely. (p. 68A, *infra*). The Board affirmed without comment, (p. 52A, *infra*). The circuit court held that ". . . the Board was correct in refusing to allow the

[1] At the time, the court was composed of the Chief Justice and seven Justices.

administrative delay to prejudice the claimants." (p. 6A, *infra*); and further, that to do so would be ". . . both unjust and inconsistent with the Supreme Court's decision . . ." (p. 8A, *infra*).

Also in connection with the hearing, petitioner obtained a subpoena duces tecum directed first to the Board's Regional Director (R21)[2] and later to the Board's General Counsel (R25) requiring production of notes and memoranda made by Board agents during interviews with the thirty-three claimants named in the supplemental backpay specification. These memoranda were prepared by non-lawyer compliance officers and were referred by them in the preparation of the backpay specification. The notes and memoranda included factual information bearing upon credibility of witnesses and relevant to the issues which had to be developed if petitioner was to defend itself against the gross amounts of backpay claimed.[3]

The comprehensive manner in which petitioner's request for documents was pressed is outlined in the footnote.[4]

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[2] This and all "R" references are to the joint appendix filed in the circuit court which document, consisting of two volumes, is being certified and transmitted to this Court as the record in accordance with Supreme Court Rule 21(2).

[3] The initial specification sought $342,000.00 but the ultimate liability imposed was $119,790.00. Thus, the inflation in the initial specification amounted to 64.7%. In the instant case, $54,551.00 was sought and $53,078.00 was awarded by the Board. (p. 57A, *infra*). Except for a single claim amounting to $9,592.00 which was remanded by the court of appeals, all awards, essentially unmitigated, were enforced. The remanded claim is not made a subject of this application.

[4] a) Subpoena duces tecum to Regional director dated February 5, 1971. (R21).
b) Subpoena duces tecum to counsel for General Counsel dated March 23, 1971 (R25).
c) Letter to General Counsel dated March 10, 1971 (R42).
d) Letter to counsel for the General Counsel dated March 10, 1971 (R54).
e) Oral requests, e.g. R232-243.
f) Motion to dismiss (R46; 859-875).
g) Exception, (R85).
Although the Trial Examiner ordered compliance with the subpoenas (R772-775) he was reversed by the Board on a special interim appeal. (R28;30). Letter requests were also denied. (R30)

The General Counsel refused to produce the notes and memoranda of the Board's lay personnel, claiming privilege, and the court of appeal ultimately agreed that the work product of the Board's lay personnel was protected in a trial proceeding by a "qualified privilege."

REASONS FOR GRANTING THE WRIT

POINT I

Although the Board and the court of appeals purported to consider the impact of the Board's further delay on the rights of the parties the decision of both is that this Court's 1969 opinion in *NLRB v. J. H. Rutter Rex Manufacturing Co.*, supra, foreclosed the issue.

Such construction of this Court's 1969 decision is erroneous and has resulted in the failure of the Board and the court to apportion the prejudicial effects of the delay between the parties. This Court limited its 1969 opinion to the circumstances then presented, to wit: the administrative delay preceding the filing of the initial backpay specification. This Court did not anticipate nor dispose of in advance the delay issue related to the supplemental backpay specification.

In its 1969 opinion, this Court cited *NLRB v. Electric Vacuum Cleaner Company, Inc.*, 315 U.S. 685 (1942), a case in which the Court refused *further to shorten* a backpay period which had already been shortened by the Board because of its administrative delay. See *Electric Vacuum Cleaner Company*, 18 NLRB 591, 636-637 (1939). *Electric Vacuum Cleaner* establishes the right of the Board to exclude a portion of the backpay period if the Board has unreasonably delayed the proceedings.

This Court's 1969 opinion dealt solely with the power of the reviewing court to modify a Board order — not with the power of the Board to consider its own delay in drafting its remedial order. The error of the Board lies in its belief that this Court's 1969 opinion precluded it from considering the further delay. The court of appeals erred in not requiring the Board to make findings on the delay issue and to consider the interests of the employer who was prejudiced by the delay. See *NLRB v. Brown*, 380 U.S. 278, 291-292 (1965).

POINT II

The effect of the court of appeals decision is to create a *new* evidentiary privilege precluding the production of factual material.[5] The court did not rely upon any judicially recognized privilege or statutory exemption from disclosure.

In its petition to quash the subpoena duces tecum (R23), the Board's General Counsel contended that the notes and memoranda of the Board's lay personnel which he refused to produce were the privileged "work product" of the Board's "agents" citing *Hickman v. Taylor* 329 U.S. 495, 67 S. Ct. 385 (1947), and in its brief to the court of appeals at page 16, the Board stated, ". . . the materials sought, which included notes and other memoranda made by Board agents in preparation of the case, are the 'work product' of such agents. *Hickman v. Taylor*. . . ."

In upholding this contention, the court of appeals has

[5] Whether or not a claimant looked for work during a given period, the names of employers and potential employers, dates of employment, dates of job applications, dollar amounts of interim earnings, if any, and reasons for lack of interim earnings, the information sought by the subpoenas, is hard factual information. The non-lawyer compliance officers questioned the claimants on these matters (R229-232; 244-249) and used the information elicited from them to prepare the supplemental specification. (See e.g. footnote 10 of the supplemental specification at R7).

improperly extended the "work product" exemption from discovery of *Hickman v. Taylor*, to a non-lawyer in a trial proceeding. *Hickman v. Taylor*, was decided on the basis of the public policy that a lawyer, in performing his duties to the court and to his client, must be able to work with a degree of privacy, free from unnecessary instrusion. (329 U.S. at p. 510). See *U.S. v. Proctor & Gamble Company*, 356 U.S. 677, 683 (1958). The Fifth Circuit has previously held that *Hickman v. Taylor*, does not extend to non-lawyers. *Southern Railway Company v. Lanham*, 403 F.2d 119 (5th Cir. 1968); *Southern Railway Company v. Campbell*, 309 F.2d 569 (5th Cir. 1962). Clearly, the same policy considerations do not prevail when the documents involved are those of a non-lawyer.

The court of appeals purported to qualify the privilege so that it might give way to disclosure in certain circumstances where a balancing of the interests of the litigants required it. (see p.21A and p.39A, *infra*). However, the court reasoned from an illogical premise. While it stated that the privilege might give way when the need for production outweighs the rationale for the privilege (p. 39A, *infra*) it also held, "Absent some showing of manifest injustice, the Board behavior must stand or fall on the existence *vel non* of that privilege and not on what this court perceives to be the fairest way for the Board to run its proceedings." (p. 11A, *infra*)

Furthermore, in qualifying the privilege, the court of appeal created a non-rule to be applied on an *ad hoc* basis depending upon ". . . who is investigating, what is being investigated, and the nature and content of the information sought to be discovered from the investigator." (p. 21A, *infra*) There is, therefore, no standard for the application

of this new privilege even if it can be considered "qualified" in view of the court's basic premise. (p. 11A, *infra*)

The problems created by the lower court's decision in its application in future cases can not be minimized by pretrial discovery. Although the Government, as a litigant, is generally considered subject to the rules of discovery, *U.S. v. Proctor & Gamble Company*, 356 U.S. 677, 681 (1958), there is no pretrial discovery in National Labor Relations Board proceedings. See *NLRB v. Interboro Contractors, Inc.*, 432 F. 2d 854 (2d Cir. 1970) (cert. den., 402 U.S. 915); see also, *Morgan Precision Parts v. NLRB*, 444 F. 2d 1210 (5th Cir. 1971).

The court of appeals opinion is also in direct conflict with the decision in *General Engineering Inc. v. NLRB*, 341 F.2d 367 (9th Cir. 1965) and with an earlier decision of the Fifth Circuit by a different panel in *NLRB v. Capitol Fish Company*, 294 F.2d 868 (5th Cir. 1961).

General Engineering was a backpay proceeding. Comparison of the subpoenas issued in the instant case to that issued in *General Engineering* and quoted at footnote 1 of 341 F.2d 367, reveal that the subpoenas sought identical information. Against a claim of privilege, the Ninth Circuit held that the subpoena duces tecum should not have been quashed by the Board.[6]

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[6] The Ninth Circuit described the privilege claimed in *General Engineering* as one claimed under Board Rule 102.118 (29 CFR §102.118), also relied upon in the instant case (R22), which rule insulates from disclosure all information which comes to a Board employee in the course of his official duties. This was the same type of privilege urged below in the instant case.

See also, *NLRB v. Seine and Line Fishermen's Union of San Pedro*, 374 F.2d 974 (9th Cir. 1967); *Florence Printing Company v. NLRB*, 376 F.2d 216, 223 (4th Cir. 1967); *Heinrich Motors, Inc. v. NLRB*, 403 F.2d 145, 150 (2nd Cir. 1968) where the Court held, "The law recognizes no general privilege between a discharged employee and a Board Compliance officer and the board has no power to create such a privilege."

The court of appeals erroneously distinguished *Capitol Fish* on the grounds that it did not involve the issue of privilege. (p. 8A, *infra*).[7] To the contrary, Judge Wisdom stated in *Capitol Fish*.

> "In the final analysis, justification for excluding government records rests on privilege." (294 F.2d at p. 874)

and,

> "It seems to us, however, that when a party has filed a request for evidence or testimony and the request can be denied only if the evidence or testimony is privileged, the question of privilege is as squarely raised by an unexplained refusal to reply as by an express claim of privilege and the court must decide the question." (294 F.2d at p. 975).

It is apparent that the identical issue was presented in the instant case but it was decided differently.

The effect of the court's decision on the ability of future respondents to defend themselves before the Board is likely to be substantial and harmful. This case represents not only a departure from the jurisprudence on the subject of privilege, but also a departure by the Board from the manner in which it customarily handles its cases by taking statements producible under the "Jencks Rule" embodied in the proviso to Board Rule 102.118, 29 CFR §102.118 (R236-242).

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[7] *Capitol Fish* involved a request that a Board attorney testify in a Board proceeding concerning an investigation which would have had an important bearing on the credibility of the witnesses who testified against the employer. (See 294 F.2d at p. 870-871). The Court held, "We hold that the investigating attorney's testimony was material, was not privileged, and was erroneously excluded . . ." (294 F.2d at p. 876).

Respondents before the Board are in a peculiar procedural position because of the lack of pretrial discovery coupled with the disadvantage of litigating in a proceeding in which the Board is investigator, accusor, prosecutor, judge and reviewing tribunal. (See *NLRB v. Capitol Fish Company*, 294 F.2d at p. 876). In backpay cases, the only tool of successful defense is frequently the claimant's statement used for purposes of cross examination.

To the end of depriving respondents of this defense tool and placing an intolerable defense burden upon them, it may be to the Board's interest to investigate cases without any documention producible under its rules. Thus, the probable effect of this decision, if allowed to stand, will be to encourage general non-disclosure rather than merely to serve a legitimate need of reasonable privacy in the fulfillment of the Board's statutory duties."

Curbing this attitude on the part of Board agents will promote fairness in Board proceedings and compliance with the statutory mandate that such proceedings be conducted, so far as practicable, in accordance with the rules of evidence and procedure applicable in the district courts. (29 U.S.C. §160(b)).

Reversal of this decision will not impair the Board function because prior to this case the Board customarily collected formal statements from claimants. It has been held that "No special characteristics of an administrative

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[9] In this regard, 5 U.S.C. §552 (b) (5) and (7) afford protection to the Board against disclosure of certain investigative and law enforcement files but not with respect to information which is "available by law to a party" as determined by reference to discovery practices regulated by the courts. Cf. *Tennessean Newspapers, Inc. v. Federal Housing Admin.*, 464 F.2d 657 (6th Cir. 1972); *G.S.A. v. Benson*, 415 F.2d 878 (9th Cir. 1969); *Consumers Union of U.S. v. Veterans Admin.*, 301 F.Supp. 796 (S.D.N.Y. 1969); See also, *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971).

hearing justify the exclusion of evidence which it would be error to exclude in a court trial. . . ." *NLRB v. Capitol Fish Company*, supra (294 F.2d at p. 872); furthermore, this Court has enjoined the circuit courts to assure that the Board keeps within "reasonable bounds". *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); see *NLRB v. Brown*, 380 U.S. 278 (1965).

The departure of the Board in this case from its customary procedures prompted the Trial Examiner to state,

> "The reason for the Jencks rule, in the opinion of the Trial Examiner, is to keep the Government servants honest and to bring about the circumstance in which no citizen or person may be found guilty of a statutory offense, when the government has in its possession [sic] which would indicate that citizen or person not guilty of such an offense. It, no doubt, shocks our sense of fair play where the government may have evidence to prove that an individual is not guilty of an offense and withholds that and the individual is found guilty of the offense. I think the intent of all rules of this character must be circumscribed by the fact that no person be ever found guilty of any statutory offense where the government had possession of facts and evidence and testimony and documents which would indicate that that person was not guilty of the offense." (R773-774)

The court of appeals holding is unauthorized by statute and is in conflict with prior decisions of the Fifth and Ninth Circuits. Furthermore, the newly created privilege is so substantial a departure from the accepted and usual rules of conduct for judicial proceedings, applicable to Board proceedings, as to call for an exercise of this Court's

power of supervision in an important area of federal labor law not heretofore settled by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE

It is certified that three copies of the foregoing petition for a writ of certiorari have been served by mail, by depositing same in a United States mail box, first class airmail postage prepaid, addressed as follows:

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Honorable Peter G. Nash
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New Orleans, Louisiana, May 4, 1973.

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3260

J. H. RUTTER REX MANUFACTURING COMPANY, INC.,
Petitioner-Cross Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross Petitioner.

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board (Louisiana Case)

(January 16, 1973)

Before COLEMAN, GOLDBERG and GODBOLD, Circuit Judges.

GOLDBERG, Circuit Judge: This case involves the propriety of a back-pay order issued by the N.L.R.B. against petitioner, J. H. Rutter Rex Manufacturing Company, Inc. The genesis of the back pay claim is the company's failure to reinstate various employees

who had participated in an unfair labor practice strike in 1954. This is the fifth time this case has appeared before this Court and hopefully, it will be the last.[1]

The background chronology of this judicial marathon is as follows: In April, 1954, there was a strike at petitioner's plant that lasted for one year.[2] On February 13, 1956, the N.L.R.B. issued a decision holding that the company had violated §§ 8(a)(1) and 8(a)(5) of the N.L.R.A. and that therefore the strike had been an unfair labor practice strike. 115 N.L.R.B. 388. The Board's order of mandatory reinstatement of all the strikers was enforced by this court. *N.L.R.B. v. J. H. Rutter Rex Mfg. Co., Inc.*, 5 Cir. 1957, 245 F.2d 594. Included in that order was a requirement that Rutter Rex make whole any striker for lost earnings resulting from the company's failure to offer reinstatement. *See* § 10(c) of the N.L.R.A., 29 U.S.C. § 160(c). Many of the strikers were denied timely reinstatement and to remedy this the Board undertook the preparation of a back-pay specification.

Four years later, in November, 1961, following a lengthy investigation, the Board issued the first back-pay specification and notice of hearing. The specification consisted of the back-pay claims of all strikers

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[1]In 1968, the last time this case was here, Judge Coleman remarked: "After thirteen years let the books be closed on this controversy." 399 F.2d 356, 365. Four and one-half years later, we can only echo his words.

[2]The facts surrounding the strike are succinctly set out in N.L.R.B. v. Rutter Rex, 1969, 396 U.S. 258, 259-260, 24 L.Ed.2d 405, 408. The Board proceedings are more fully discussed in N.L.R.B. v. J. H. Rutter Rex. Co., Inc., 5 Cir. 1957, 245 F.2d 594.

who had been denied reinstatement for any part of the period in question. An attempt by Rutter Rex to have the proceedings permanently enjoined because of the four year delay was denied by this court. *N.L.R.B. v. J. H. Rutter Rex*, 5 Cir. 1962, 305 F.2d 242. Extensive hearings were then held on the claims in the specification, and in June of 1964 the trial examiner issued his initial findings. Two years later, in June of 1966, the Board adopted most of the trial examiner's findings and issued its first supplemental decision and order of back-pay liability. 158 N.L.R.B. 1414.[3]

This court, reviewing the Board's initial back-pay order, modified that order by terminating petitioner's back-pay liability as of July 30, 1959. *N.L.R.B. v. J.H. Rutter Rex Mfg. Co., Inc.*, 5 Cir. 1968, 399 F.2d 356. The primary justification for the modification was that the prolonged delay of the Board in issuing the order prejudiced the company's ability to defend the claims and that equity therefore required that an appropriate limit be put on the liability. On appeal, the Supreme

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[3]In its order the Board specifically reserved the possibility of further back-pay being ordered for those claimants who had not been offered reinstatement by June, 1961, which was the terminal date for computing liability for the first back-pay specification.

> "With respect to those employees whose backpay was still accruing, as found by the Trial Examiner in his Supplemental Decision, payment to them of the net amount found to be due and accruing constitutes satisfaction of [the Company's] obligation only up to June 24, 1961, which is the end of the period covered by the specification."

Id. at 1425. It is the back-pay for the period after June 24, 1961, that is the subject of the appeal *sub judice*.

Court reversed this court's modification and held, in essence, that the claimants should not be penalized for the Board's delay. *N.L.R.B. v. J. H. Rutter Rex Mfg. Co., Inc.*, 1969, 396 U.S. 258, 24 L.Ed.2d 405. In April, 1970, this court, on remand from the Supreme Court, issued its judgment enforcing the Board's original back-pay order.

Following entry of the final order in the above proceedings, which involved the first back-pay order [Rutter Rex I], the Board's Regional Director began preparation of a second back-pay specification for those claimants whose back-pay claims extended beyond June, 1961. The second back-pay specification and notice of hearing was issued on November 30, 1970. A hearing on the specification was held in February and March of 1971, and the trial examiner's decision issued in June, 1971. On November 5, 1971, the Board issued its order granting supplemental back-pay to 33 claimants who had not been offered reinstatement until after June, 1961. 194 N.L.R.B. No. 3 (1971). Six of the claims extended beyond 1963 and the remaining twenty-seven were for a period of only two years or less.[4]

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[4]The total back-pay awarded in the second order was $53,078 plus interest at 6% commencing June 2, 1964. The sums awarded to individual claimants were as follows:

Victoria Allen	$2,543	Louise Jackson (deceased)	$1,236
Sonora Barnes (Rochon)	340	Eunice Johnson	2,772
Doris E. Bowles	812	Lila Mae Landry (Coston)	102
Marguerite Boronier	1,601	Dorothy White (Learson)	1,591
Miriam Cheri	530	Leonard Lewis	386
Bessie Cooper (Lee)	1,591		
Georgiana Davis (Deruisa)	2,252		

On November 17, 1971, Rutter Rex filed a petition in this court for review of the Board's second supplemental back-pay order. On December 27, 1971, the Board filed a cross application for enforcement of its order. In seeking to have this court set aside the back-pay order for the post-1961 period, the company raises the following contentions of error: (1) The Board failed to consider its own delay in setting the second back-pay award; (2) the punitive nature of the hearing, particularly the Board's refusal to produce various Board records, denied the company a fair hearing; and (3) the evidence failed to support the awards to many of the claimants. With the exception of the Board's failure to produce certain notes relating to the Watford claim, we reject each of the company's assertions.

I. The Board's Delay

As it did in *Rutter Rex I*, the company is alleging that the Board's delay prejudiced its ability to defend and that, therefore, the delay should somehow allow it to escape its liability to the claimants. Specifically, the company claims that the Board erred in refusing

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Lenora Davis	236	Bessie Montgomery	393
Alice T. Denly (Gabriel)	21	Adele Nash (Hall)	1,532
Gloria Dixon	191	Desideria O'Campo	766
Minnie M. Fernandez	2,185	Yvonne Parnell (Charles)	1,367
Ethel Mae Foreman (Askin)	1,414	Dorothy K. Reed	962
Edna Francis	1,161	Adele L. Robertson	1,181
Jimmie Lou Green	3,536	Rosalie Thornton	807
Gustavia Haynes (Gale)	4,530	Marjorie Walker	351
Victoria Henderson	2,121	Alma Wallace	52
Rose Marie Hicks	1,778	Fannie M. Watford	9,592
		Beatrice White (Lane)	3,007

to even consider the delay as a factor. In support of its argument, the company continually refers to Justice Marshall's words in *Rutter Rex I*, in which he said that the opinion was limited to the "circumstances of this case." 396 U.S. at 259. Therefore, the company argues, the delay should have been considered anew in the second back-pay proceeding. We reject the company's argument for two reasons.

First, there is no indication that the Board did not, in fact, consider the delay.[5] Indeed, there is ample evidence to the contrary. The trial examiner ordered the general counsel to explain the delay in issuing the second specification. Only after the examiner considered and accepted the explanation was the delay factor rejected.

Secondly, we explicitly find that the Board was correct in refusing to allow the administrative delay to prejudice the claimants. In *Rutter Rex I*, the Supreme Court rejected the identical claim on almost identical facts, stating:

> "We do not mean that delay in the administrative process is other than deplorable. It is deplorable if, as the Court of Appeals thought, the company was hampered in the presentation of its defenses to the back-pay specification by the delay. It is even more deplorable if, as seems clear, innocent employees had to

[5]The company points to one sentence in the Board's opinion, that, referring to whether the Board's delay should be a factor in reducing liability, stated "The Supreme Court [in *Rutter Rex I*] has answered it adversely to the respondent."

> live for some years on reduced incomes as a combined result of the delay and the company's illegal failure to reinstate them. It may be that the company could have, through the courts, compelled earlier Board action. But the Court of Appeals exceeded the narrow scope of review provided for the Board's remedial orders when it shifted the cost of the delay from the company to the employees in this case."

396 U.S. at 265-266.

In this second back-pay order we find the case against allowing the delay factor to prejudice the claimants to be even stronger than in *Rutter Rex I*. Before commencing the second back-pay specification, the Board wisely waited until after the first back-pay order was approved by the courts. Had the Court of Appeals decision limiting back-pay liability to the pre-1959 period been accepted by the Supreme Court, *a fortiori*, a post-1961 back-pay specification would have been of dubious legality. We cannot fault the Board for waiting until after the first back-pay order was finalized before beginning the second specification. In addition, the company had been on notice from the time of the 1966 Board order that post-1961 back-pay remained to be computed.[6] The fact that the company did not offer reinstatement to some of the claimants until 1970 provides further justification for the Board's waiting until it did to begin the second back-pay specification. As the Board points out, "If the Board had held the second hearing prior to the May, 1970 reinstatement of the

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[6] *See* note 3, *supra*.

last striker, yet a third hearing would have to have been held after their backpay periods had been tolled by offers of reinstatement."

The delay that has taken place in the adjudication of these claims is most unfortunate. Some of the fault obviously lies with the sluggish internal operations of the Board. The company, however, in failing to reinstate as ordered by the Board and by appealing the initial order is also very much to blame. Certainly, it would be both unjust and inconsistent with the Supreme Court's decision in *Rutter Rex I* to require that the otherwise entitled claimants pay the price for the delay, which was in no way caused by them. We find that the Board was correct in rejecting this defense.

II. Denial of a Fair Hearing

The primary focus of the company's claim that it was denied a full and fair hearing before the Board is the refusal of the Board to allow the company access to certain Board files that might have aided the company in impeaching some or all of the back-pay claimants. We discern three somewhat distinct objections made by the Company: (A) The general failure of the Board to follow its normal procedure of collecting statements from the back-pay claimants and later making them available to the employer; (B) The Board's overruling of a subpoena duces tecum by which the company sought access to the Board's investigative files, and the continued refusal of the general counsel to produce these files upon request; and (C) The Board's refusal to allow Witness Lacey, a former Board compliance officer, to refresh his recollection

while testifying by referring to his own memoranda located in the Board files. With the exception of the third point, we find the company's arguments to be without legal merit.

A. Board Procedures as a Denial of a Fair Hearing.

In its briefs and argument to this court, the company unleashes a broad based attack on the procedures followed in this case. It alleges, in substance, that the Board's goal was to inflict "a monetary penalty upon respondents in as high an amount as obtainable." Specifically, the company refers to the Board's refusal to follow the usual procedures of collecting statements from the claimants and making them available to the company for impeachment purposes. As support for the charge of unfairness, the company points to the fact that the ultimate award in the second back-pay order was almost unchanged from the back-pay specification originally prepared by the Regional Director. Since the specification contains, in effect, the gross claims, this indicates that the company's defense to the second back-pay order was, by and large, totally impotent.[7]

We begin by noting that it is not the proper role of this court to establish Board investigative or discovery procedures. Absent a showing of unfairness, we are not at liberty to pass legal judgment on their proc-

[7]In the first back-pay order, the company waged a vigorous defense against the back-pay claims with the result being that only $119,790 was *awarded*. The amount *claimed* in the first back-pay specification was $342,000.

esses. *See N.L.R.B. v. Vapor Blast Mfg. Co.*, 7 Cir. 1961, 387 F.2d 402, 407. If, on occasion in the past, the Board has chosen to collect certain information and provide various items from its records to employers, that is its prerogative and it might well be the better practice in many cases. Where the Board, however, chooses to forego collection of the formal statements and to resist production on grounds of certain judicially approved privileges, as it did here, we cannot condemn the practice simply because the Board has used different procedures in the past. The Board's procedures are not that strait-jacketed.

In *Brown v. Thompson*, 5 Cir. 1970, 430 F.2d 1214, this court was faced with the contention of a wrongful death claimant that the government, by refusing to produce a police report involving the investigation of the deceased's death, had made it impossible for plaintiff to succeed. Upholding the district court's refusal to require disclosure, we said:

> "Government documents are the outstanding example of matter which is privileged and which is not subject to disclosure. . . . Whether there should be a disclosure is within the discretion of the trial court and, like other discretionary matters, the determination of the court should be made by a balancing of interests. The exercise of discretion, like other matters of discretion vested in trial courts, will be considered upon review for an abuse of discretion. It is the unusual and exceptional case where the determination of the trial court is set aside. Swanner v. United States, 5th Cir. 1969, 406

> F.2d 716; Adams v. United States, 5th Cir. 1958, 260 F.2d 467, cert. den., 359 U.S. 934, 79 S.Ct. 649, 3 L.Ed.2d 635 (1959). The judges of the Court of Appeals might well feel that under like circumstances they would have exercised the judicial discretion in a manner different from that in which it was exercised by the trial court. But, this is not a basis for reversing the determination of the trial court. The test is whether there has been an abuse of that discretion and in this case we hold that there was no such abuse."

430 F.2d at 1216. Although that case involved a district court and not the Board, we think its reasoning is fully applicable here. Simply because an appellate court perceives that a fairer result might have been reached through the production of certain investigative notes, it does not follow that such production should be judicially mandated. The Board did not arbitrarily refuse disclosure in this case, *c.f.*, *N.L.R.B. v. Capitol Fish Co.*, 5 Cir. 1961, 294 F.2d 868, to the contrary, it based its refusal to produce, at least in part, on a recognized evidentiary privilege — the qualified privilege that protects the internal deliberations of a government agency. Absent some showing of manifest injustice, the Board behavior must stand or fall on the existence *vel non* of that privilege and not on what this court perceives to be the fairest way for the Board to run its proceedings. Since we find, *see* § B *infra*, that the Board's claim of privilege was legally justified, we refuse to abort the proceedings on the grounds that the Board did not follow some other procedure.

As further grounds for claiming that the Board proceedings were unfair, the company points out that its task of defending the back-pay claims was, in effect, impossible without the aid of the Board records. The key defensive issues in a back-pay hearing are whether the claimant had sufficiently attempted to mitigate his back-pay claim by seeking equivalent work or whether in refusing to accept a bonafide offer of reinstatement the claimant has waived his back-pay entitlement. *See generally, N.L.R.B. v. Miami Coca-Cola Bottling Co.*, 5 Cir. 1966, 360 F.2d 569. Since much of the information regarding these questions is peculiarly within the province of the claimant's own mind, it is argued that it is unfair to preclude the company from having access to whatever relevant evidence the Board has that could be used to impeach the claimant's allegations of full mitigation efforts. That is particularly true, as the company points out, when most of the facts in issue took place some ten years earlier and the marshalling of defensive evidence is therefore all the more difficult.

Although this argument is logical on its face, it ignores the established law on the burden of proof in back-pay proceedings. In addition, it fails to give a fair account of the evidence available in the proceedings below. It is well established in this circuit and most others that the Board's primary duty in back-pay proceedings is to show the gross back-pay due each claimant. As Judge Wisdom stated in *N.L.R.B. v. Mooney Aircraft, Inc.*, 5 Cir. 1966, 366 F.2d 809, 812-13:

> "While the General Counsel has the burden of proving unlawful discrimination on the part of the employer, and hence that backpay is

> due, the employer usually has the burden of establishing affirmative defenses which would mitigate his liability. NLRB v. Miami Coca-Cola Bottling Co., supra; NLRB v. Brown & Root, Inc., 8 Cir. 1963, 311 F.2d 447. Among these affirmative defenses are the unavailability of jobs because of nondiscriminatory factors, the employees' wilful loss of earnings, and employees' interim earnings to be deducted from the backpay award." (footnotes omitted)

See also, Winn-Dixie Stores, Inc. v. N.L.R.B., 5 Cir. 1969, 413 F.2d 1008, 1009; *Florence Printing Co. v. N.L.R.B.*, 4 Cir. 1967, 37 F.2d 216, 222-223; N.L.R.B. *v. Reynolds*, 6 Cir. 1968, 399 F.2d 668, 669-670; *cf. N.L.R.B. v. Mastro Plastics Corp.*, 2 Cir. 1965, 354 F.2d 170.

If the burden of proof is on the company, and not the Board, to show a failure of the claimant to mitigate fully his back-pay claim, *a fortiori*, there is no burden on the Board to gather this evidence and make it available. The fact that the Board might possibly possess[8] relevant evidence with potential value as impeachment material should not entitle the company ipso facto to to a wholesale fishing expedition into the Board's files in derogation of the claimed privilege.

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[8]Although a positive showing of materiality should not always be necessary, it is relevant that the company has not, with exception of the Watford claim, made a very strong showing that the Board files did, in fact, contain any evidence at all that would be usable in impeaching the claims.

Although much can be said for a rule requiring the Board to open wide its files to all parties in proceedings such as these, we cannot forget that the Board's role in a back-pay proceeding is, in large part, to represent the interests of claimants who have already been adjudged to be entitled to reparations for the company's earlier transgressions of the Act. While we must never lose sight of the ultimate fact that the Board remains a governmental body, with concomitant obligations of impartiality in its functions, some concessions must be made to the Board's role as advocate on behalf of the public and of the victims of unfair labor practices.[9] In accommodating these necessarily conflicting roles, we believe the Board has adequately separated its prosecutorial arm from its judicial arm and that a private litigant can still get a fair hearing without the Board's role as an advocate suffering. In any event, Congress has chosen to amalgamate the Board's arms and we do not have the privilege of amputating them. Certainly, the burden of proof in back-pay proceedings, as enunciated in *Mooney*, is not so onerous as to require that the company be allowed to defend the back-pay claims with the Board's files in its hands. As with other prosecutorial and regulatory agencies, in order for the N.L.R.B. to fulfill its statutory duties, it must be accorded some semblance of evidentiary privilege to protect its informal investigatorial and trial-preparatory processes. *See, e.g., United States v. Morgan*, 1941, 313 U.S. 409; *N.L.R.B. v. Clement Brothers Co.*, 5 Cir. 1969, 407 F.2d 1027; *Davis v. Braswell Motor Freight Lines*, 3 Cir. 1964, 363 F.2d 600.

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[9]The problem inherent in the dual role imposed on administrative bodies in litigation of this sort is thoughtfully discussed in K. DAVIS, 2 AD. LAW TREATISE, chap. 13.

It is true that the behavior of the general counsel, the Board's prosecutorial arm, can be characterized as partisan, but we cannot say that this partisanship denied Rutter Rex a fair hearing. There is no allegation or showing that the trial examiner was in any way biased or that the Board did not accord a fair review to the trial examiner's findings. Numerous avenues for impeaching the claims were, in fact, available to the company. Literally all of the claimants were voluntarily produced by the general counsel[10] and were available for cross-examination under oath. The record indicates that the company received from the Board any statements made by these claimants that reasonably fell within the Board's Jencks rule. *See* note 12, *infra*. The back-pay specification provided the names of the claimants' interim employers and the interim earnings of each claimant. Furthermore, the general counsel supplied all of the claimants' Social Security records and the claimants themselves produced numerous documentary records pursuant to subpoena. In short, although it might have been difficult for the company to meet its burden under *Mooney*, we cannot say that it was impossible. The company was not, as it would have us believe, sent into the river without an oar. We refuse to find that a company cannot receive a fair hearing in a back-pay suit unless it has the broad access to Board investigatory files that was requested and denied here. The Supreme Court in *Rutter Rex I*, *supra*, 396 U.S. at 263, made it quite clear that this court serves a limited function

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[10]Louise Jackson (deceased) and Alice Denley who resides in California and whose claim is less than $25 were the only claimants not produced.

when reviewing a back-pay award made by the Board. *See also N.L.R.B. v. Seven-Up Bottling Co.*, 1953, 344 U.S. 344, 346. With this mandate in mind, we cannot, with the exception of the Watford claim, say that this record compels a finding that the company was denied a fair hearing. *See N.L.R.B. v. Chambers Mfg. Co.*, 5 Cir. 1960, 278 F.2d 715, 716; *N.L.R.B. v. Vapor Blast, supra.*

B. The Existence vel non *of a Privilege for the Board's Files.*

We next deal more specifically with the company's claim that the Board's investigatory files were not entitled to the privilege or immunity from discovery accorded in this proceeding. In the course of the litigation below, the company issued a *subpoena duces tecum* requiring the Board to produce:

> "Each and every statement, written and/or recorded and memoranda made by or as a result of interview or contact with any person, including backpay claimants, which pertains to employment, search for employment, interim earnings, availability for employment and or any other matter affecting any backpay claimant named in the Supplemental Backpay Specification for the periods January 1, 1961 through December 31 of the year in which each individual claim terminates . . ."

The trial examiner overruled the general counsel's petition to revoke the subpoena, but upon a special telegraphic interim appeal the Board reversed the exam-

iner, holding that the "trial examiner's ruling is too broad with respect to matter required to be produced." The trial examiner then denied the company's motion to dismiss the supplemental specification because of the refusal to divulge and the Board upheld this denial. The question we must decide is whether the internal investigatory files of the Board, and specifically notes taken during interviews with back-pay claimants, should be accorded some evidentiary privilege protecting them against the wholesale production requested here.

We feel it is necessary to dispose first of the company's persistently urged contention that our decision in *N.L.R.B. v. Capitol Fish Co.*, 5 Cir. 1961, 294 F.2d 868, precludes the claim of privilege relied on by the Board. *See also General Engineering, Inc. v. N.L.R.B.*, 9 Cir. 1965, 341 F.2d 367. In both *Capitol Fish* and *General Engineering* requests were made by the company for the Board to produce its files relating to the issue being tried. The Board's refusal to produce in both cases was based solely on its own internal rule (§ 102.118) prohibiting the production of any Board documents without the written consent of the Board or the general counsel. Since the only basis for withholding the documents was this self-created internal rule, which gave the Board unlimited ability to preserve secrecy, the courts wisely overruled the Board and required production.

In *Capitol Fish*, Judge Wisdom explicitly excepted from his ruling the type of situation before us now. He said:

> "There is no suggestion in the record that the testimony sought to be elicited from the Board's attorney is privileged. . . . The Board's General Counsel made no explanation and the trial examiner was satisfied with the bare fact that the agency head charged with knowing what is right and good for the public to know had made its decision."

294 F.2d at 875. The court concluded by condemning the Board's refusal to produce because it was based solely on the whim of the Board itself, rather than on some recognized evidentiary or other privilege. "Responsibility for deciding the question of privilege properly lies in an impartial independent judiciary — not in the party claiming the privilege and not in a party litigant." *Id.* at 876.[11]

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[11]Similarly, in General Engineering, *supra*, 341 F.2d at 375, the court specifically said, when rejecting the open-ended claim of privilege made by the Board:

> "There are probably some court decisions which recognize a carte blanche 'privilege' of this kind. But, in view of section 10(b) of the Act, discussed above, and the last sentence of 5 U.S.C. § 22, discussed above, we believe that the claim must be particularized with reference to some generally recognized privilege accorded governmental agencies. Such, for example, are claims that the information sought would disclose confidential informants (Mitchell v. Bass, 8 Cir., 252 F.2d 513), state secrets (United States v. Reynolds, 345 U.S. 1, 7, 73 S.Ct. 528, 97 L.Ed. 727), military secrets (United States v. Reynolds, supra), or *mental processes of those engaged in investigative or decisional functions* (United States v. Morgan, 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429; Appeal of Securities & Exchange Commission, 6 Cir., 226 F.2d 501, 519)[13]. In the proceeding now before us no such privilege was either claimed or found to exist." (Emphasis added)

This is a different case. From the very beginning, the Board based its refusal to produce, at least in part, on the established evidentiary privilege that accords qualified protection to the informal deliberations of all prosecutorial agencies and branches of government. *See, e.g., United States v. Morgan, supra; N.L.R.B. v. Clement Brothers Co., supra.* In scrutinizing the instant claim of privilege, we therefore receive little guidance from *Capitol Fish, supra;* rather, we must base our decision on an analysis of whether the privilege claimed is a valid one in the situation before us.

The subpoena quashed by the Board requested production of all the material from the Board's files that was obtained from the Board's investigations and interviews with the claimants. The matter contained in these files was admittedly informal, hand-written notes taken by Board officers during and after interviews with the claimants. There is no claim that any statements producible under the Board's Jencks Rule[12] were not produced. While it might be a better practice to collect formal statements from the claimants, which would be producible under the Jencks Rule, that was not the procedure followed here and we are not at liberty to dictate the investigatory procedures the Board must follow.

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[12] *See* N.L.R.B. v. Safway Steel Scaffolds Co. of Georgia, 5 Cir. 1967, 383 F.2d 273, 278. It is not disputed that the Board notes that were withheld did not contain any statements that were signed or otherwise approved by the claimants; nor were there any substantially verbatim transcriptions in the withheld files. Thus, in short, the rationale for production under the Jencks Act was simply not present here. *See Id.; see also* Palermo v. United States, 1958, 360 U.S. 343; United States v. Blackburn, 5 Cir. 1971, 446 F.2d 1039; United States v. Roberts, 5 Cir. 1972, 455 F.2d 930.

The notes sought to be discovered here were the thoughts, deliberations and impressions of Board officials, recorded during and after interviews with the claimants. There is absolutely no guarantee that such notes are either complete or accurate. Aside from the potential inaccuracy of these notes, we must also consider the Board's interest in keeping the informal processes and deliberations of the Board free from mandatory production. This interest is grounded in the need to keep the Board's investigatory and prosecutorial functions uninhibited, and, as with the work product of any litigant, there should be some limit on the amount and type of preparatory material that can be subject to mandatory production. *Cf. Hickman v. Taylor*, 1945, 329 U.S. 495.[13]

The fact that these were notes of non-lawyers, *see* Rule 26(b)(3) of the Federal Rules of Civil Procedure, *Crocker v. United States*, 51 F.R.D. 155 (S.D. Miss., 1970); *see also Harper & Row Publishers, Inc. v. Decker*, 7 Cir. 1970, 423 F.2d 487, *aff'd by equally divided court*, 1971, 400 U.S. 348, *reh. denied*, 401 U.S. 950; *see generally*, WRIGHT & MILLER, 8 FEDERAL PRACTICE & PROCEDURE § 2024; and non-department heads, *cf. United States v. Morgan, supra*, does not preclude the Board from claiming a qualified privilege for its investigative work files. The work of the Board

[13]Although the need to prevent inhibition of employee testimony is not quite as great in a back-pay interview as it is in unfair labor practice cases, we feel that what Judge Morgan has called "the common sense necessity of protecting the investigatory function and procedures of the Board" deserves recognition here. Clement Brothers, Inc. v. N.L.R.B., 282 F.Supp. 540, 542 (N.D. Ga., 1968), *aff'd*, 5 Cir. 1969, 407 F.2d 1027.

officers here was an integral part of the preparation of the Board's lawsuit, and the files here requested are entitled to whatever qualified privilege would normally be available to such documents. *See generally*, 4 MOORE'S FEDERAL PRACTICE §§ 26.63, 26.64; *cf. Southern Railway Co. v. Lanham*, 5 Cir. 1968, 403 F.2d 119, 131-133.

We feel it necessary to emphasize that the qualified privilege we here recognize is not a blanket privilege that arises solely from the fact that the information being sought is investigatory matter in the hands of an investigatory or prosecutorial agency. There is no such universal privilege, qualified or otherwise. Rather, in any given situation there may be — or may not be — a qualified privilege.[14] It all depends on who is investigating, what is being investigated, and the nature and content of the information sought to be discovered from the investigator. Here, where the investigative material sought was informal impressions and deliberations, the qualified privilege attaches.

Another fatal deficiency in the company's subpoena is that in seeking to gain access to the Board's files for impeachment material, it failed to state with suf-

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[14]The differences between the issue of whether an evidentiary privilege exists and the issue of whether an existent privilege has been overcome so as to deny its availability in the particular circumstances is a substantive difference and not a semantical one. Recognition of the difference may control, among other things, the respective burdens of the claimant of the privilege and of the seeker of information to come forward with evidence and the burden of ultimate persuasion as to whether the information is or is not to be produced. We do not in this case create a plenary privilege where no such privilege theretofore existed.

ficient particularity what value, if any, the files would have to it. "Although a party is entitled to production of documents that would be useful to impeach a witness, his mere surmise that he might find impeaching matter has been held not sufficient to justify production." WRIGHT & MILLER, *supra*, § 2025 at 226-227; *see Hauger v. Chicago, R.I. & P.R. Co.*, 7 Cir. 1954, 216 F.2d 501, 508. The primary balancing interest favoring production is need. The requisite showing of materiality and necessity must be greater than the utter speculation exhibited here by Rutter Rex if the privilege is to be overriden.

In sum, we believe that the Board's claim of privilege was properly interposed, *cf. N.L.R.B. v. Capitol Fish*, *supra*, and that the Board did not abuse its discretion in granting the motion to quash the subpoena or in refusing to dismiss for non-production of the files. The privilege we here recognize is not, to be sure, an unqualified one. Rather, it recognizes the fine balancing of interest that is involved in the creation, enforcement, and drawing of exceptions to any evidentiary rule. Were the documents here sought more facially reliable, or if there did not exist any feasible alternative means to impeach the claimants,[15] or if there were a more specific demand than the one made here, the balance might very well be struck in such a way as

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[15]Again, we repeat that the Board voluntarily produced all claimants, the claimants were subject to examination under oath, *see* 4 MOORE'S FEDERAL PRACTICE § 26.64 [3], n. 12 and cases cited therein, numerous earnings records were made available to the company, and all Jencks Acts statements were produced.

to overcome the qualified privilege protecting the Board's investigative files.[16]

Whether we label the protection here accorded the Board's files a "privilege" or a qualified "immunity" from discovery is not essential.[17] What is important is that in seeking to pierce this privilege, the factors favoring production, including *inter alia*, reliability, materiality, necessity, and specificity, must outweigh the factors in favor of the qualified protection. In the case before us, we find that the balance was properly struck by the Board's granting of the motion to quash.

C. *The Board's Refusal to Produce the Watford File for Purposes of Refreshment.*

Although closely related to the above discussion, we find that the Board's refusal to provide the file containing officer Lacey's notes, when requested to refresh Lacey's memory on the stand, warrants both a separate discussion and a different result.

During the board hearing on the second back-pay specification the company called as a witness John T. Lacey, a retired Board compliance officer who had interviewed Fannie Watford, to testify as to his recollection of Watford's claim. Watford ultimately was awarded back-pay of $9,592 for the period July 25, 1961,

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[16] In Davis v. Braswell Motor Freight Lines, Inc., 5 Cir. 1966, 363 F.2d 600, 605, Judge Thornberry stated the issue thusly: "Since Braswell has not presented sufficient justification in this case for overriding this privilege, the sound policy behind the privilege requires that the subpoena be quashed."

[17] *See* WRIGHT & MILLER, *supra*, § 2025.

through April 19, 1968, the Board having found that no reinstatement was offered prior to the latter date. The company vigorously opposed the finding, claiming that Watford had, in fact, been offered reinstatement in December, 1961, and, in fact, there was some evidence of such in the record. The company lacked specific documentation for its allegation that Watford was offered reinstatement in 1961, and sought the testimony of Lacey. The company believed that Lacey could give testimony that Watford had, during an interview, admitted that some sort of offer had been made to her by the company in 1961.

The following exchanges took place at the hearing before the trial examiner after it had become clear that Lacey was unable to recall the details of the Watford interview:

"BY MR. LUND [Counsel for Rutter Rex]:

Q. Did you make a memorandum of your interview with Mrs. Watford?

A. [Lacey] I believe I did because I think I made one in each and every instance.

Q. Do you know where that memorandum is today? Do you have it with you?

A. No, I don't have any of that material. It was retained by the Board when I left but all I can suggest is that wherever I had made notes, there was an individual file folder for a particular person and it would be contained in that small file for that person.

Q. Do you think a reference to that file folder would help you refresh your recollection on this individual?

A. It might well do that. I couldn't be certain of that. It would be dependent upon how extensively I had taken notes. It's the only method whereby I think my memory could be refreshed.

...

MR. LUND:
I would call for production of the file Mr. Lacey referred to containing the memorandum of this interview.

MR. CHAMPAGNE [Counsel for N.L.R.B.]:
We will not furnish them, Mr. Examiner. It does not fall within the purview of 102.118 and the Board's rule and regulations are, and Mr. Lacey is not an employee of the Board anymore.

MR. JOHNSTON [Counsel for N.L.R.B.]:
Mr. Lacey is not testifying as our witness.

TRIAL EXAMINER:
Perhaps you could interpret to me what the Board means when it says, "The Trial Examiner's ruling is too broad with respect to the matter required to be produced." Now, the Respondent has narrowed it.

MR. CHAMPAGNE:
Except for one thing, Mr. Examiner. Your ruling pertained to Mr. Norton [Board

Attorney], as I recall, and this is not Mr. Norton.

TRIAL EXAMINER:

That's right. But it refers to the Board's files. I take it you are raising the privilege against disclosure. Is that what you're raising?

MR. CHAMPAGNE:

To someone other than a Board employee. Mr. Lacey is not testifying as a Board employee, from the files of the Board.

TRIAL EXAMINER:

I have not reached the point where there should be any waiver of privilege. I am simply indicating that now we have a specific request for specific information which has to do with something that is in the files of the Board. Are you standing on the privilege not to produce them?

MR. CHAMPAGNE:

He is not entitled to them because he is not an employee of the Board.

. . .

TRIAL EXAMINER:

We have a situation where the Trial Examiner has held that any evidence Mr. Lund is seeking to adduce is material to these proceedings. We have a witness whose memory is not such that he can remember the content of an interview which

he had with a party to these proceedings, a claimant, and what would refresh his recollection now is in the hands, held by the Government. Are you taking the position that the Government can hold that memorandum, stand upon the privilege of 102.118? Is that your point of view?

[A short recess was then taken at the Board's request]

. . .

MR. JOHNSTON:

We will not at this time furnish it, since there has been no ruling that we are required to.

MR. LUND:

I ask for such ruling. I call for production of the records and the witness is here prepared to refresh his recollection from it. It is his record and it is being used for that particular purpose, in refreshing his recollection. So, I would ask —

TRIAL EXAMINER:

Are you asking that the Trial Examiner order General Counsel to produce the records?

MR. LUND:

I call for production of it and suppose I would ask the Trial Examiner to order it produced.

. . .

I think it would be relevant and admissable [sic]. If the memorandum is here, it is relevant and admissable [sic] and we simply ask that he be allowed to refresh his recollection.

[At this point there was further testimony involving the Watford claim, various letters were produced and it became clear that there was at least some question as to whether reinstatement was offered prior to 1968].

...

A. [LACEY, in response to question whether reinstatement had been offered]:
Like I say, I'm just at a loss without reference to perhaps some other records that would reflect some information that would refresh my memory.

Q. Such as the memoranda we referred to before, that would be likely to be in Mrs. Watford's personal file.

A. Possibly.

...

TRIAL EXAMINER:

Do you have further questions of this witness?

MR. LUND:

I would ask, in view of Mr. Lacey's further testimony, whether the Government would now produce the memorandum. To me, it

is simply a question of this witness reviewing his records. So, I would just reiterate that request and then I have a few questions to ask him on another point.

TRIAL EXAMINER:

What's the Government's position?

MR. CHAMPAGNE:

Mr. Examiner, we don't think he has laid a proper foundation. First of all, he appears to be fishing for them. Secondly, this is his witness, not ours. The Government did [not] call him. Section 102.118 of the Board's rules and also Ra-Rich pertaining to witnesses that are produced for cross examination —

...

MR. CHAMPAGNE:

Mr. Examiner, we would stand on Rule 102.118, that the proper request has not been made for these records through the General Counsel. It is not General Counsel's witness and does not come under 102.118 or Ra-Rich on cross examination. He's on a fishing expedition and Mr. Lacey said his decision was probably made on the April 16th letter and nothing else and he just said there was a possible memorandum in the file, which has not been established. These are all the work product of an individual and we reiterate that he is his

witness and I don't believe there is any applicable Board law or procedure or any other precedent that has been established that requires production of these documents pursuant to any subpoena duces tecum issued upon us and, also —

. . .

TRIAL EXAMINER:

Any further questions of this witness [Lacey]?

(No response.)

TRIAL EXAMINER:

If not, this witness is excused.

MR. CHAMPAGNE:

Just a moment, Mr. Examiner.

One thing I do want to bring up before he leaves, as I recall at this point in connection with any possible memoranda that Mr. Lund had requested from my files pertaining to Mr. Lacey's testimony, that we had argument on this but I don't believe you directed us to produce or have ruled on it, at this point and Mr. Lund just decided to go ahead.

MR. LUND:

I don't intend to withdraw from any position I have taken on the record. I also think there ought to be a point where an issue

was framed and we ought to go about concluding the hearing but I don't withdraw from any position I have taken.

TRIAL EXAMINER:
It is not clear in the Trial Examiner's mind whether there is anything for him to rule on in this respect.

MR. CHAMPAGNE:
We have nothing of Mr. Lacey.

TRIAL EXAMINER:
You may be excused, Mr. Lacey."

App. Vol. 2, pp. 940-978.

Although the record is far from precise on this point, our reading of the foregoing leads us to conclude that the company did, both as a matter of fact and law, make a sufficient request at the hearing for the Watford file to be produced for the purpose of allowing Lacey to refresh his memory and that the Trial Examiner acceded to the Board's refusal to produce the file. The following narrow question is therefore before us: Should the general counsel have been required to produce the Watford file, containing Lacey's notes, for the purpose of allowing Lacey to refresh his memory?

Although Lacey's notes were part of the internal files that we have today held were not producible under a subpoena duces tecum, there are several factors that

distinguish this particular request for the Watford file. First, the primary justification for the existence of the qualified privilege for the Board's internal files is to protect the government's interest in retaining some sort of confidentiality in its internal deliberations. The request here was not for the entire set of 33 files but only for the Watford file and, in particular, Lacey's notes within that file. Had Lacey's memory been better, he could have recited the material from the stand. At one time he did have access to all of the material that was being requested, much of which was, in essence, his own personal deliberations on the matter. It is true that Lacey was no longer with the Board, but we think that fact is not crucial here.

The Board has little real need to prevent its former officers from remembering a particular factual matter. We are not here dealing with some sort of military information that the government has an overriding interest in keeping secret. The confidentiality sought to be preserved in the type of case before us is the internal communications and deliberations of the agency members themselves. It serves little purpose to expand this privilege to the point where the Board can withhold notated deliberations from the very person whose deliberations are being sought. Admittedly, a similar argument can be made regarding the need to preserve the confidentiality of the entire back-pay files. But the point is that, in this instance, the argument for preserving the confidentiality of one file from the eyes of one who at least partially constructed the file is far less compelling than when we were dealing

with the company's broadly addressed subpoena duces tecum.

A second distinguishing feature is that the request here made was more narrow and specific than the subpoena request. Unlike the subpoena which was, in effect, a request to use the Board's investigatory files in order to uncover *any* information that might possibly benefit the company's case, this request had a very narrow focus and purpose. Lacey had stated on the stand quite clearly that if he could see the file, he might be able to clear up in his own mind the narrow question of Fannie Watford's reinstatement offer. The Watford file was sought with this in mind, and as the Trial Examiner apparently recognized, this request cannot be compared to the "fishing expedition" that was attempted with the subpoena.

Third, we must pay due deference to the purpose for which the files were requested. The specific reason was not to obtain evidence that the company could use to impeach Watford's claim. That was the sole purpose of the subpoena requesting all of the files. Rather, the Watford file was sought for the explicit purpose of refreshing the recollection of a witness who was already on the stand and testifying directly about a matter that he himself thought could be more accurately resolved if he could review the file.

The law is well established that in many situations a party cannot depend upon an otherwise valid evidentiary privilege when an otherwise inadmissible item is being used for the purpose of refreshing a wit-

ness' memory and is not being used as evidence. For example, in *Thompson v. United States*, 5 Cir. 1965, 342 F.2d 137, the defendants, on appeal from their criminal conviction, claimed that it was error to permit a police officer, testifying against them to use certain of his own recorded statements to refresh his memory on the stand. It was admitted that the recorded statements were inaccurate, and that they were dictated, but not recorded by the officer on the stand. It is clear that the statements would have been inadmissible as independent evidence. We held there that as long as the district court properly supervised the use of the statements to refresh and that they were genuinely used only for that purpose, it was not error to permit the use of the otherwise unreliable and inadmissible recorded statements. *See also, Allis-Chalmers Mfg. Co. v. City of Fort Pierce, Fla.*, 5 Cir. 1963, 323 F.2d 233; *United States v. Barrata*, 2 Cir. 1968, 397 F.2d 215; *United States v. Tolbert*, 7 Cir. 1966, 367 F.2d 778; *Kramer v. Commissioner*, 7 Cir. 1968, 389 F.2d 236; *Hall Bartlett Prod. v. Republic Pictures Corp.*, 20 F.R.D. 625 (S.D. N.Y. 1957); *see generally*, III WIGMORE § 758-765 (Chadbourn Rev.). The technical prerequisites for refreshment were clearly met by Lacey. These are, as we said in *Thompson v. United States, supra*, 342 F.2d at 139, that "the witness demonstrated a need for having his memory refreshed and the paper used had that effect." This is not a case of one party seeking to have items in his possession, otherwise excludable, admitted into evidence under the questionable guise of refreshing a witness' memory. *Cf. N.L.R.B. v. Hudson Pulp and Paper Corp.*, 5 Cir. 1960,

273 F.2d 660, 665-666, but rather this was a legitimate effort to refresh an exhausted recollection.

We are aware that most of the cases allowing refreshment deal with claims that the item sought to be employed was inadmissible, generally under the hearsay rule, and that in this case the use of an item for refreshment was being objected to by the party who was in possession of the items and who was withholding them under a claim of privilege. But as we said earlier, the privilege here claimed is a qualified one, and it is defeasible on good cause shown. Certainly, the reasoning underlying the above cited cases, which clearly favors the allowance of refreshment even where items are otherwise inadmissible can be applied here. In short, (1) since the items were being sought solely to refresh and not as evidence; and (2) since the law clearly favors the procedure of permitting a witness to refresh an otherwise exhausted recollection from items, admissible or otherwise, that are capable of jolting the memory, the Board's claim of privilege when confronted with the request for the Watford file is much weaker than in the case of the broad subpoena.

A fourth reason for treating the request for the Watford file differently from the broad subpoena request is the clear showing made here by the company that production of the Watford file for the purpose of refreshing Lacey's memory might very well resolve a disputed material factual issue. Throughout Lacey's testimony it is clear that the company might possibly have offered reinstatement to Watford in December,

1961, and if this was the case, the award to Watford would have been only a fraction of the ultimate award granted. The file was sought solely for the light it would throw on this issue, and from our reading of the record, there is a good chance that production of the file could have resolved the issue, at least in the mind of witness Lacey. Unlike the subpoena, for which there was no showing of any specificity that anything in the file would have had impeachment value, the request for the Watford file was supported by a clear showing of materiality and for that reason we feel its non-production was prejudicial to Rutter Rex.

Finally, despite the existence of many of the similar dangers of unreliability discussed above, there are good reasons for treating the reliability problems of the Watford file request differently. In the case of the subpoena request, we are dealing with files the use of which for impeachment purposes would be fraught with dangers of double hearsay. Not only would we be allowing the interviewer's notes of what the claimant said to be used for disputing the truth of what the claimant was alleging (one level of hearsay), we would be ascending to the second level of hearsay because there is no guarantee that the author of the rough interview notes in each file would be available to testify as to the accuracy of his own recorded impressions. The use of interview notes under such circumstances cannot be considered conducive to the ascertainment of a reliable factual picture and, indeed, it might likely be counterproductive to the search for truth.

By contrast, the use of Lacey's notes to refresh his own recollection has little if any of these dangers. The second level of hearsay is removed by virtue of the fact that Lacey is present, on the stand and subject to cross-examination as to any matter adduced from his notes. The objection to the first level of hearsay, arising from the use of Lacey's notes as to what Watford said in the past, is answered by three factors. First, the claimant, Watford, did in fact appear and was available for examination and cross-examination as to any matter ascribed to her by Lacey's recorded impressions. Secondly, any of Watford's statements from the interview that are usable against her on the issue of reinstatement are technically admissions and would thereby be exempt from the exclusionary rule. *See*, McCORMICK, EVIDENCE §§ 39, 239; *see also*, *Straughan v. Barge MVL No. 802*, 291 F.Supp. 282, 285 (S.D. Tex. 1968). Thirdly, and most important of all, the Watford file was not requested for use to impeach nor as evidence; rather, we are asked only to allow its limited use to refresh the memory of a witness.

It must be remembered that in upholding the Board's quashing of the subpoena, we were strongly influenced by the inherent unreliability of the rough interview notes. With Lacey, once he was on the stand and testifying as to what he remembered about the interviews in question, we cannot believe that allowing him to see his own notes, however incomplete or inaccurate they may be, would present the same dangers as directly using incomplete interview notes to impeach all the claimants. The company sought these notes solely

as a means to help Lacey better remember, and we agree that the quest was a proper one.

For all of the foregoing reasons we find that even though the Board was not required to produce all of its interview and investigative files relating to the back-pay order, the trial examiner did err in not requiring the Board to produce the Watford file for the narrow purpose of allowing Lacey to refresh his memory. We emphasize that the file was producible only for the purpose of refreshing Lacey's memory and not for use as independent evidence for the company to use to impeach Watford. For all the reasons outlined in section B, *supra*, the files retain the qualified privilege regarding their use as evidence. *See Allis-Chalmers Mfg. Co. v. City of Fort Pierce, Fla., supra.*

Since we find that the Board erred in refusing to produce Watford's file for the purpose of allowing refreshment of witness Lacey's memory and that such refusal was prejudicial, it follows that Rutter Rex was denied a fair hearing on the claim of Fannie Watford. The company is entitled to a new hearing before the Board on the Watford claim, at which time the Board must permit Lacey to review the Watford file if a similar situation arises.

The company further asserts that the trial examiner should have applied an adverse inference against the Board when it failed to produce relevant evidence. *See Auto Workers v. N.L.R.B.*, D.C. Cir. 1972, 79 LRRM 2332. Although this might be appropriate in certain situations, we feel that it would be a fairer disposition

to remand the Watford claim and give the general counsel an opportunity to produce before applying an adverse inference that would prejudice the innocent claimant.

Our holding does not give the parties in a Board proceeding the right to subpoena Board investigative personnel as a device to circumvent otherwise valid Board privileges, and we assume that the factual posture of this case is somewhat unique. Our holding is limited in that Lacey voluntarily appeared; he explicitly testified that he once had knowledge of the fact at issue and that if he could review the file, his recollection of that fact could probably be revived, and that due to his retirement, he no longer had access to the file.

As we stated in part B., *supra*, the evidentiary privilege asserted by the Board to protect its informal investigative deliberations is a qualified one that can be overcome when the need for production outweighs the rationale for the privilege. Professor Moore has defined our task in these cases as follows.

> "Whether particular material is or is not privileged must be determined from case to case and not on the basis of any general formula that all Government files are privileged. On the other hand, a blanket inspection of Government investigation files should not be allowed.
>
> . . .

> "In each case the court must also balance the degree of necessity for disclosure shown by the private litigant against the importance of the maintenance of secrecy as to the particular privileged matter."

4 MOORES's FEDERAL PRACTICE §26.26 [6. — 4] pp. 316-317.

After carefully balancing the interests asserted here, we uphold the Board's quashing of the subpoena, but we find that the Board erred in not permitting Lacey to view the Watford file for the purpose of refreshing his memory.

III. Sufficiency of the Evidence

Rutter Rex contends that the awards to many of the claimants were not supported by the evidence and should therefore be disallowed by this court. Rutter Rex correctly argues that a claimant is not, under the law, entitled to back-pay to the extent that she (1) fails to remain in the labor market during the period for which back-pay is claimed, (2) refuses to accept substantially equivalent employment, (3) fails to search diligently for alternative work, or (4) voluntarily quits alternative employment. *N.L.R.B. v. Mastro Plastics, supra.* Despite these requirements, however, the law is also clear that the defense of willful loss of earnings is an affirmative defense that places the burden of proof squarely on the employer. *N.L.R.B. v. Mooney Aircraft, Inc., supra,* 366 F.2d at 813. If the employee shows that gross back-pay is owing to him,

the burden is then on the company to disprove liability by showing the existence of any of the four above factors. *See N.L.R.B. v. Cashman Auto Co.*, 1 Cir. 1955, 223 F.2d 832.

The company, dividing the claimants into categories, contends that it met its burden by proving that many of the claimants did not meet their mitigation obligations and that therefore we should disallow the claims. We reject the company's arguments categorically.

A. Category 1 — This group consists of eleven claimants[18] who Rutter Rex claims remained at low paying jobs while laid off from the company and who therefore "failed to seek substantially equivalent employment" as they are required to do. There is substantial evidence in the record indicating that these claimants were quite possibly working at the highest level of employment they could find. Certainly by "lowering their sights" and accepting what might have been the best job available, the claimants were doing all that could reasonably be expected of them by way of mitigation. *See N.L.R.B. v. Southern Silk Mills*

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18 Doris E. Bowles
Ethel Mae Foreman (Askin)
Jimmie Lou Green
Louise Jackson
Eunice E. Johnson
Dorothy White (Learson)
Adele Nash (Hall)
Desideria O'Campo
Yvonne Parnell (Charles)
Dorothy K. Reed
Beatrice White (Lane)

B. Category 2 — In this group the company places four claimants[19] whose mitigation efforts, in part, were proved by showing that they remained eligible for state unemployment compensation. Since the state unemployment procedures were apparently quite lax and one could evidently remain on the rolls without ever making a bona fide effort to find employment, the company argues that it was error for the trial examiner to base his finding of the claimant's eligibility on this. Although we agree that meeting the state eligibility requirements for unemployment benefits should not, in itself, be sufficient to meet the burden of due diligence, *see N.L.R.B. v. Pugh & Barr, Inc.*, 4 Cir. 1953, 207 F.2d 405, we find substantial evidence, other than the unemployment qualification, in the record of a bona fide effort made by each of the four claimants to obtain employment at various times during their eligibility period.

C. Category 3 — This group consists of four claimants[20] who the company asserts confessed to a Board agent in May, 1963, that they had abandoned any in-

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19 Victoria Allen
Marguerite Bozonier
Sonora Barnes (Rochon)
Gustavia Haynes Gale

20 Mariam Cheri
Gloria Dixon
Desideria O'Campo
(Also included in Category I)
Marjorie Walker

terest in returning to Rutter Rex. The trial examiner excluded as irrelevant an offer of evidence as to this. The company, claiming that this materially bears on the question of mitigation effort, urges that this was error. We agree with the Second Circuit that exclusion of such statements, although possibly probative on the issue of mitigation effort, should not constitute reversible error where there is no real indication that the statements were reliable. *Heinrich Motors, Inc. v. N.L.R.B.*, 2 Cir. 1968, 403 F.2d 145, 149-150. As did the Second Circuit, we believe that the statements here excluded "are of little value in determining whether there has been a withdrawal from the labor market or a waiver of reinstatement when they [the statements] are made before the company has offered reinstatement" *Id.* at 150. Here, the only basis for asserting that the claimants abandoned interest were some contested notations in the Board files. Under such circumstances we consider *Heinrich* fully applicable and we refuse to hold that the exclusion of this evidence was reversible error.

D. Category 4 — This group contains two claimants[21] who the company asserts should have had their back-pay period terminated at the time they temporarily left the job market for health reasons. This argument is based on the company's contention that the claimants would not have been entitled to return to work after such an absence if they had been working at Rutter Rex. This argument assumes that Rutter

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21 Adele L. Robertson
Rose Marie Hicks

Rex did not have any sick leave policy that would permit employees leaving for health reasons to return to work. In *Rutter Rex I*, the Board found "the record shows a general pattern among the female employees of leaving [the Company's] employ because of pregnancy, illness, etc., and later returning to work." 158 N.L.R.B. at 402. The company has not shown that such a policy does not still exist and we cannot say that the Board's finding that back-pay should not be terminated was improper.

E. Category 5 — In the fifth and final category the company lumps Bernice Cooper Lee, whose claim we already disposed of in § C, *supra*, and Georgiana Davis (Deruisa), who the company claims could not meet her burden of seeking employment because of her need to stay home with little children. There was no direct testimony that Deruisa was in fact unavailable for work during the day, and we agree with the trial examiner that the company's contrary assertion was "sheer speculation." In sum, the company not having disproved the claimants' eligibility, we find that there was substantial evidence to support all of the awards.

By way of conclusion, we must add a word relating to the seemingly never ending posture of this case. If this litigation were a drama, it would be either a farce or a tragedy. With statistics to the right of us and statistics to the left of us, these eighteen long years of judicial journeying furnishes a demonstrable example for those who deplore litigation delay. There are those, be they a diminishing breed, who believe that justice shall triumph over time. Once again, we

are hopeful that precedent, logic, and law, here merging with common sense, will enable us to write *finis* to this elongated contretemps.

In crossing the bar of decision we hope, but do not really believe, that the combatants will retire in silence, if only to nurse their wounds. Having uttered our novena for spéed, however, we cannot forsake the belief that litigants believing in the rectitude of their cause are entitled to their days and perhaps years in court, we shall never fail in our duty to keep the forum open, our ears dinned daily by the anguished cries of judicial statisticians. In summary, we deplore the delay, but we would not substitute one hour of efficiency for one moment of justice.

After carefully considering each of the company's contentions of error, we order, with the exception of the Watford claim, enforcement of the Board's entire back-pay order. The Watford claim is remanded to the Board for further proceedings not inconsistent with this opinion.

ENFORCED IN PART
REMANDED IN PART

APPENDIX B

Filed—Feb. 7, 1973
Edward W. Wadsworth, Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3260

J. H. RUTTER REX MANUFACTURING COMPANY, INC.,

Petitioner,

v.

NATIONAL LABOR RELATION BOARD,

Respondent.

JUDGMENT

Before: Coleman, Goldberg and Godbold, Circuit Judges.

THIS CAUSE came on to be heard upon a petition to review, and on a cross-application for enforcement of, a back-pay order of the National Labor Relations Board dated November 5, 1971, and corrected November 17, 1971, directed against J. H. Rutter Rex Manufacturing Company, Inc., its officers, agents, successors and assigns. The Court heard argument of respective counsel on October 24, 1972, and has considered the briefs and transcript of record filed in this case. On January 16, 1973, the Court being fully advised in the premises handed down its opinion granting enforcement of the Board's said order in part and remanding the case in part to the Board for further proceedings consistent with the Court's opinion. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that J. H. Rutter Rex Manufacturing Company, Inc., its officers, agents, successors and assigns, shall pay to the following employees involved in this proceeding as net backpay the amounts awarded to them with interest at the rate of six percent per annum, commencing June 2, 1964, and continuing until the amounts are paid in full, but minus tax withholding required by Federal and State laws.

Victoria Allen	$2,543
Sonora Barnes (Rochon)	340
Doris E. Bowles	812
Marguerite Bozonier	1,601
Miriam Cheri	530
Bessie Cooper (Lee)	1,591
Georgiana Davis (Deruisa)	2,252
Lenora Davis	236
Alice T. Denley (Gabriel)	21
Gloria Dixon	191
Minnie M. Fernandez	2,185
Ethel Mae Foreman (Askin)	1,414
Edna Francis	1,161
Jimmie Lou Green	3,536
Gustavia Haynes (Gale)	4,530
Victoria Henderson	2,121
Rose Marie Hicks	1,778
Louise Jackson (deceased)	1,286
Eunice Johnson	2,772
Lila Mae Landry (Coston)	192
Dorothy White (Learson)	1,591
Leonard Lewis	386
Bessie Montgomery	393
Adele Nash (Hall)	1,532
Desideria O'Campo	766
Yvonne Parnell (Charles)	1,367
Dorothy K. Reed	962
Adele L. Robertson	1,181
Rosalie Thornton	807
Marjorie Walker	351
Alma Wallace	52
Beatrice White (Lane)	3,007

IT IS FURTHER ORDERED in view of the death of Louis Jackson, that Respondent pay to Jackson's estate or any person or persons as their interests may appear the backpay due and owing on behalf of Jackson, including interest.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that the case with respect to the Watford claim be and it is hereby remanded to the Board for further proceedings consistent with this Court's opinion.

ENTERED: FEB. 7, 1973

Issued as Mandate: MAR. 20, 1973

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3260

J. H. RUTTER REX MANUFACTURING COMPANY, INC.,
Petitioner-Cross Respondent,
versus
NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross Petitioner.

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board (Louisiana Case)

ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC
(Opinion Jan. 16, 1973, 5 Cir., 1973, 373 F.2d 223).

(March 12, 1973)

Before COLEMAN, GOLDBERG and GODBOLD, Circuit Judges.

PER CURIAM: The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are DENIED.

APPENDIX D

New Orleans, La.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 15-CA-721
15-CA-723

J. H. RUTTER-REX MANUFACTURING COMPANY, INC.
and
AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO

ORDER CORRECTING SECOND SUPPLEMENTAL DECISION AND ORDER

On November 5, 1971, the National Labor Relations Board issued a Second Supplemental Decision and Order[1] in the above-captioned proceeding in which there is an inadvertent omission.

IT IS HEREBY ORDERED that said Second Supplemental Decision and Order be, and it hereby is, corrected by adding the words "with interest" at the end of the first sentence of the Order.

IT IS FURTHER ORDERED that the Second Supplemental Decision and Order, as printed, shall appear as hereby corrected.

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[1] 194 NLRB No. 6.

Dated, Washington, D. C., November 11, 1971.

By direction of the Board:

John C. Truesdale

Deputy Executive Secretary

D—5620

New Orleans, La.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 15—CA—721
15—CA—723

J. H. RUTTER-REX MANUFACTURING COMPANY, INC.

and

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO

SECOND SUPPLEMENTAL DECISION AND ORDER

On February 13, 1956, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding[1] in which it found that Respondent had violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended. The Board's Order directed Respondent, *inter alia*, to offer to the unfair labor practice strikers who made unconditional requests for reinstatement immediate and full reinstatement to their former or substantially equivalent positions, and to make them whole for loss of pay resulting from the failure to reinstate them on request. Thereafter, the Board's Order was enforced in full by the United States Court of Appeals for the Fifth Circuit, including its reinstatement and backpay provisions.[2]

Pursuant to a backpay specification and appropriate notice issued by the Regional Director for Region 15, a hearing was held before Trial Examiner Owsley Vose for the purpose of determining the amounts of backpay due

[1] 115 NLRB 388.
[2] 245 F.2d 594.

the discriminatees. On June 6, 1966, the Board issued a Supplemental Decision and Order[3] in which it ordered Respondent to pay to certain enumerated discriminatees backpay in the amounts found by trial Examiner Vose, as modified by the Board. The Board found, *inter alia*, that with respect to those employees whose backpay was still accruing, payment to them of the net amount found to be due and accruing constituted satisfaction of Respondent's obligation only up to June 24, 1961, the terminal date of the backpay specification.

Thereafter, the United States Court of Appeals for the Fifth Circuit granted in part and denied in part the Board's cross-petition for enforcement of its Supplemental Decision and Order.[4] The court found that the Board had been guilty of "inordinate" delay in issuing the backpay specification and it modified the Board's Order to eliminate all backpay accruing after July 1, 1959. On writ of certiorari to the Fifth Circuit Court of Appeals, the United States Supreme Court reversed the circuit court's judgment.[5] On April 6, 1970, the circuit court issued its supplemental judgment enforcing the Board's Supplemental Decision and Order.

Pursuant to a supplemental backpay specification and appropriate notice issued by the Regional Director for Region 15 on November 30, 1970, a hearing was held before Trial Examiner Lowell Goerlich for the purpose of determining the amounts of backpay due the 33 discriminatees whose backpay continued to accrue beyond June 24, 1961, the end of the period covered by the initial backpay specification. On June 23, 1971, the Trial Examiner

[3] 158 NLRB 1414.
[4] 399 F.2d 356.
[5] 396 U.S. 258.

issued his Decision in Backpay Proceedings, which is attached hereto, in which he awarded specific amounts of backpay to the 33 discriminatees. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision in Backpay Proceedings and a supporting brief. The General Counsel filed exceptions to the parts of the Decision, a supporting brief, and a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this proceeding to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. During the hearing Respondent served a *subpoena duces tecum* on the Regional Director for Region 15 requiring him to produce "each and every statement, written and or recorded and memoranda made by or as a result of interview or contact with any person, including backpay claimants, which pertains to employment, search for employment, interim earnings, availability for employment and or any other matter affecting any backpay claimant for the periods January 1, 1961 through December 31 of the year in which each individual claim terminates." Pursuant to National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, Sections 102.117 and 102.118, Respondent sought the General Counsel's permission for the Regional Director for Region 15 to comply with the subpena. Thereafter, the General Counsel denied Respondent's request on the ground that "the information sought is in the nature of pretrial discovery which is not available in unfair labor practice hearings" and it "is in the nature of investigatory materials

compiled for law enforcement, and is of a privileged or confidential nature," falling within the exemptions of 5 U.S.C. Section 552(b).

Thereafter, Respondent served a *subpoena duces tecum* on Thomas D. Johnston, counsel for the General Counsel in the instant proceeding, requiring him to produce the identical material previously sought from the Regional Director. Counsel for the General Counsel then filed a petition to revoke *subpoena duces tecum* with the Trial Examiner contending, inter alia, that, as noted above, the General Counsel had refused to release the same information pursuant to the subpena directed against the Regional Director; that in the instant situation Respondent had not requested the General Counsel's permission to allow Counsel Johnston to comply with the subpena; that the material sought by Respondent constituted the Board agents' "work product" and thus need not be produced; that the subpena did not describe with sufficient particularity the evidence sought; and, in any event, that all witnesses' statements, as defined in Rules and Regulations Section 102.118(d), would be made available for purposes of cross-examination pursuant to Section 102.118(b)(1).

In opposing the General Counsel's petition to revoke, Respondent argued to the Trial Examiner, as it did in its brief in support of exceptions before the Board, that, in view of the protracted nature of the proceeding and Respondent's inability therefore to obtain evidence needed to formulate its defense, the General Counsel should be required to produce the data upon which he based the supplemental backpay specification.

The Trial Examiner concluded that, since the General Counsel had called the compliance officer who prepared

the supplemental backpay specification, and he had as a witness testified how each discriminatee's backpay claim was determined, the General Counsel had "waived the privilege against disclosure and has impliedly given his consent, disclosing to the Respondent all files, documents, reports and memoranda and other records which were utilized by Mr. Norton [the compliance officer] in framing his testimony as well as framing the specifications. In the Trial Examiner's opinion, therefore, the Respondent is entitled to any files, documents or memoranda or records of the Board which touch upon the testimony or are relevant to the testimony of Mr. Norton or to the specifications as filed in this proceeding. Consequently, the Trial Examiner overrules the motion to revoke the subpoena."

Thereafter, the General Counsel filed a request for special permission to appeal the Trial Examiner's ruling to the Board contending that the Trial Examiner cited no precedent for his ruling, that Respondent had not secured permission for release of said documents, and, moreover, that the Compliance Officer only testified to matters contained in the supplemental backpay specification and did not physically refer to documents, memoranda, notes, etc., in the files while testifying except those already in Respondent's possession.

By telegraphic order dated March 25, 1971, the Board granted the General Counsel's request for special permission to appeal the Trial Examiner's ruling denying the petition to revoke subpena. The Board then reversed the Trial Examiner's ruling, stating that it was too broad with respect to matter required to be produced.

In the interim, on March 24, 1971, Respondent filed a motion to dismiss the supplemental backpay specification on

the ground that General Counsel had refused to comply with the Trial Examiner's ruling to produce the subpenaed documents. Respondent contended that the evidence sought was necessary and material to the defense of the claims alleged in the supplemental backpay specification and that the refusal of the General Counsel to comply with the Trial Examiner's ruling substantially prejudiced Respondent. Upon receiving the Board's telegraphic order reversing the Trial Examiner's ruling, the Trial Examiner denied Respondent's motion to dismiss. We agree with that ruling. Moreover, we note that in all other respects the General Counsel complied with applicable Board evidentiary rules. Thus, where affidavits of witnesses called by the General Counsel existed, the General Counsel made them available to Respondent's counsel. In a few instances, memoranda of conversations between Board agents and discriminatees were also turned over to Respondent. In keeping with the Board practice, Respondent received copies of all official social security documents pertaining to the discriminatees. Finally, except for discriminatee Denley, whom Respondent had an opportunity to call, the General Counsel called all the discriminatees involved herein so Respondent's counsel could engage in cross-examination.

The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this proceeding, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following minor modifications.

We adopt the Trial Examiner's findings and determinations of backpay due the following discriminatees except where modified herein:

Victoria Allen	$2,543

Sonora Barnes (Rochon)	340
Doris E. Bowles	812
Marguerite Bozonier	1,601
Miriam Cheri	530
Bessie Cooper (Lee)	1,591
Georgiana Davis (Deruisa)	2,252
Lenora Davis[6]	236
Alice T. Denley (Gabriel)	21
Gloria Dixon	191
Minnie M. Fernandez	2,185
Ethel Mae Foreman (Askin)	1,414
Edna Francis	1,161
Jimmie Lou Green	3,536
Gustavia Haynes (Gale)	4,530
Victoria Henderson[7]	2,121
Rose Marie Hicks	1,778
Louise Jackson (deceased)	1,286
Eunice Johnson[8]	2,772
Lila Mae Landry (Coston)	192
Dorothy White (Learson)	1,591
Leonard Lewis	386
Bessie Montgomery	393
Adele Nash[9] (Hall)	1,532
Desideria O'Campo	766
Yvonne Parnell (Charles)	1,367
Dorothy K. Reed	962
Adele L. Robertson	1,181
Rosalie Thornton	807

[6] In the amended supplemental backpay specification Lenora Davis' claimed gross backpay was reduced from $293 to $236 but the Trial Examiner inadvertently failed to note this change. The award as stated reflects this correction.

[7] In the amended supplemental backpay specification Victoria Henderson's claimed gross backpay was likewise reduced from $2,163 to $2,161 which, less found additional interim earnings of $40, results in net backpay of $2,121. The award as stated reflects this correction.

[8] In the supplemental backpay specification Eunice Johnson's alleged backpay was $2,772 but in his brief the General Counsel erroneously asserted that backpay due Johnson amounted to $2,272. The Trial Examiner apparently relied on the General Counsel's inadvertent error. The award as stated reflects this correction.

[9] The Trial Examiner found that Adele Nash (Hall) was due $1,533, as stated in the General Counsel's brief. In fact, the supplemental backpay specification alleges that Nash is due $1,532 and the award as stated reflects this correction.

Marjorie Walker	351
Alma Wallace	52
Fannie M. Watford[10]	9,592
Beatrice White (Lane)	3,007

ORDER

On the basis of the foregoing Second Supplemental Decision and Order and the entire record in this proceeding, the National Labor Relations Board hereby orders that Respondent, J. H. Rutter-Rex Manufacturing Company, Inc., New Orleans, Louisiana, its officers, agents, successors, and assigns, shall pay to the employees involved in this proceeding as net backpay the amounts awarded to them in this Second Supplemental Decision and Order. It is further ordered in view of the death of Louise Jackson that Respondent pay to Jackson's estate or any person or persons as their interests may appear the backpay due and owing on behalf of Jackson, including interest.

Dated, Washington, D. C. Nov. 5, 1971.

Edward *B.* Miller, Chairman
John H. Fanning, Member
Howard Jenkins, Jr., Member
National Labor Relations Board

(SEAL)

[10] In the amended supplemental backpay specification Fannie M. Watford's claimed gross backpay was reduced from $10,057 to $9,692 but the Trial Examiner apparently overlooked this amendment in awarding Watford $9,957 backpay. The award as stated reflects this correction, less $100 found additional interim earnings.

We agree with the Trial Examiner that Watford is entitled to backpay during the period she engaged in a strike against her interim employer, Louisiana Garment. As found by the Trial Examiner, she incurred no willful loss of earnings in looking for work. She sought and for a brief time obtained work during the strike period for which interim earnings amounting to $100 have been deducted from her gross backpay. The evidence indicates that she would have been receptive to an offer to return to work from the Respondent during the Louisiana Garment strike; no such offer was forthcoming. In these circumstances, we will not penalize Watford by disallowing her backpay for the period of that strike. *W. C. Nabors Company*, 174 NLRB 1078, 1090. To hold otherwise would be to compel a discriminatee in situations similar to Watford's to forgo the legitimate exercise of Section 7 rights against his interim employer in order to reduce the backpay liability of the employer who discriminatorily discharged him.

TXD—308—71
New Orleans, La.
UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

Cases 15—CA—721
15—CA—723

J. H. RUTTER-REX MANUFACTURING COMPANY, INC.
and
AMALGAMATED COLTHING WORKERS OF AMERICA, AFL-CIO

Thomas E. Johnston, Esq., and *Edward A. Champagne, Esq.*, of New Orleans, La., for the General Counsel.
Ralph Jackson, Esq., of New Orleans, La., and *Philip Lambert, Esq.*, of St. Louis, Mo., for the Charging Party.
Daniel Lund, Esq., and *Henry J. Read, Esq.*, of New Orleans, La., for the Respondent.

TRIAL EXAMINER'S DECISION IN BACKPAY PROCEEDINGS

History of Proceedings

LOWELL GOERLICH, Trial Examiner: On February

13, 1956, the National Labor Relations Board, herein referred to as the Board, issued a Decision and Order[1] in the within captioned cases directing Respondent, J. H. Rutter-Rex Manufacturing Company, Inc., *inter alia*, upon application, to offer to all those employees who went on strike on April 21, 1954, or thereafter immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, dismissing if necessary all persons hired on or after that date, and make such applicants whole for any loss of pay by reason of the Respondent's refusal, if any, to reinstate them by the payment to each of them of a sum of money equal to that which he would normally have earned, less his net earnings during the period from 5 days after the date on which he applied for reinstatement to the date of the Company's offer of reinstatement, to be computed on a quarterly basis. Thereafter on June 10, 1957, the Court of Appeals for the Fifth Circuit issued its decision granting enforcement of the Board's Order.[2] The court entered its decree of enforcement on August 19, 1957.

On November 16, 1961, the Regional Director for Region 15 of the National Labor Relations Board issued the initial backpay specification in this matter. On January 23, 1963, Trial Examiner Vose issued his Preliminary Intermediate Report and Order in Backpay Proceeding in which he approved the method of computing backpay set forth in the specification but provided that such computation in regard to group 5 employees should be subject to a 6 percent reduction which he found necessary in order fully to reflect the number of absences characteristic of a typical

[1] *J. H. Rutter-Rex Manufacturing Company, Inc.*, 115 NLRB 386.
[2] *N.L.R.B. v. J. H. Rutter-Rex Manufacturing Company, Inc.*, 245 F.2d 594.

employee. Thereafter, on various dates between February 12, 1963, and September 30, 1963, hearings were held on the issues raised by the Backpay Specification and the Respondent's amended answer.

On June 2, 1964, the Trial Examiner issued his Supplemental Decision in Backpay Proceedings in which he ordered specific amounts of backpay to approximately 172 claimants and denied backpay to approximately 35 others while providing for 6 percent interest on the backpay due for each quarter commencing from the date of his Decision.

On June 30, 1966, the Board issued its Supplemental Decision and Order.[3] On July 23, 1968, the United States Court of Appeals for the Fifth Circuit handed down its opinion granting in part and denying in part the cross-petition for enforcement of the Board's Supplemental Decision and Order.[4] On March 3, 1969, the Supreme Court of the United States granted the Board's petition for a writ of certiorari and on December 15, 1969, the Supreme Court handed down its opinion reversing the judgment of the United States Court of Appeals for the Fifth Circuit.[5] On remand the United States Court of Appeals for the Fifth Circuit issued on April 6, 1970, its Supple-

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[3] 158 NLRB 1414, directing, *inter alia*, that the Respondent pay to the employees involved in the backpay proceeding the net backpay amount including interest from the date of the Trial Examiner's Supplemental Decision but minus the tax withholding required by the Federal and state laws as set forth opposite their names in the Appendix to the Trial Examiner's Supplemental Decision except for certain individuals named in the Supplemental Decision and Order who were to be paid the amount set forth by the Board. Additionally, the Board held: "With respect to those employees whose backpay was still accruing, as found by the Trial Examiner in his Supplemental Decision, payment to them of a net amount found to be due and accruing constitute the satisfaction of Respondent's obligation only up to June 24, 1961, which is the end of the period covered by this specification."

[4] *J. H. Rutter-Rex Manufacturing Company, Inc.* v. *N.L.R.B.*, 399 F.2d 356 (C.A. 5).

[5] *N.L.R.B.* v. *J. H. Rutter-Rex Manufacturing Company, Inc.*, 396 U.S. 258.

mental Judgment Enforcing the Supplemental Backpay Order of the Board dated June 3, 1966, except as to certain individuals, none of whom are included in the Supplemental Backpay Specification which is the subject of this proceeding.[6]

A controversy having arisen over the amount of backpay due under the terms of the Board's Supplemental Decision and Order as enforced by a United States Court of Appeals for the Fifth Circuit, the Regional Director of the National Labor Relations Board for Region 15, pursuant to authority duly conferred upon him by the Board, issued a Supplemental Backpay Specification on November 30, 1970, in which it was alleged the amount of backpay which the Regional Director claimed was due under the Board's Supplemental Order as enforced by the court.

On February 16, 17, 18, and 19 and March 22, 23, 24, and 25, 1971, this proceeding came on for hearing on the Supplemental Backpay Specification, amendments thereto, and on the Respondent's answer. Each party was afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs in total, 122 pages, have been carefully considered by the Trial Examiner.

Upon consideration of the Supplemental Backpay Specification, the amendments thereto, the Respondent's answer, the evidence adduced at the hearing, the record as a whole, and the posthearing briefs of the parties and in view of the Trial Examiner's observation of the demeanor of the witnesses, the Trial Examiner makes the following

[6] *J. H. Rutter-Rex Manufacturing Company, Inc.* v. *N.L.R.B.*, 434 F.2d 1318.

findings of fact, conclusions of law, [illegible] reasons therefor.

First: In the Supplemental Backpay Specification, as amended, hereafter referred to as the Specification, the General Counsel seeks backpay for 32 black female claimants and 1 black male claimant covering the period from July 1, 1961,[7] until each claimant was offered reinstatement. With the exception of Louise Jackson, now deceased, and Alice Denley (Gabriel) who presently resides in the State of California and whose claim amounts to $21, all the claimants were produced for testimony by the General Counsel and were cross-examined by Respondent's counsel.

Gross backpay claims for all of the claimants, with the exception of Leonard Lewis, were based on a formula which utilized the average quarterly earnings of 15 employees in a control group, excluding those quarters where their earnings were less than $100 or less than 60 percent of the average of their three previous quarter earnings. These quarters were excluded because they were not representative. The 15 employees in the control group were among those employees in the control group used in the initial backpay proceeding and were still employed by the Respondent throughout the backpay period in the instant case. This group was selected because they were female production workers and had been treated in a similar manner in the initial backpay proceeding for determining gross backpay.

With respect to the remaining claimant, Leonard Lewis, a different formula was used because of the nature of his work and the limited backpay period. Lewis' gross backpay was computed by taking the gross earnings of

[7] The Specification in the initial backpay proceeding ended with the date of June 24, 1961.

another employee, Isaac Williams, who performed similar work and who was one of the control group used in computing Lewis' backpay in the initial backpay proceeding, and comparing his earnings in the last quarter set forth in the initial backpay specification with the amount of earnings which Trial Examiner Vose found Lewis was entitled to for that quarter and then applying percentage ratio between the earnings of Williams and Lewis for that quarter with Williams' earnings for the quarter claimed in the instant case, thereby determining Lewis' gross backpay.

The gross earnings of the control group employees were computed from July 1, 1961, through the period the claimants were entitled to backpay in the instant case. The average quarterly earnings for the control group employees were reduced by 6 percent to compensate for normal absenteeism of employees; such a reduction had been provided for by Trial Examiner Vose in the initial backpay proceeding.

The earnings of the control group employees were taken from their social security earnings records.

The figures set forth in the Specification for the quarter 1970-72 are projected earnings based on the previous quarter earnings because social security records for that period were unavailable at the time the Specification was prepared.

The interim earnings of the claimants reflected in the Specification were based on information taken from their social security earnings records for those earnings reported to the Social Security Administration and from information obtained from each claimant for any earnings not

reported on their social security earnings records. However, the majority of the interim earnings were reflected on the Social Security 4180 Forms, copies of which were furnished to Respondent. The exceptions of those earnings not reported on the social security earnings records, primarily related to domestic work and, in one instance involving Georgiana Davis (Deruisa), related to earnings derived from part-time work at two different restaurants.

Only one employee, Adele Robertson, claimed expenses in connection with her search for work, which expenses were deducted from her interim earnings during that particular quarter. This involved a $33 train fare from New Orleans to Chicago, where she subsequently obtained employment.

No claims in the Specification were made for those quarters in which net interim earnings exceeded gross backpay or for quarters or portions of quarters where the claimant was out of the labor market because of illness, maternity or personal reasons, inadequate search for work, or where backpay was tolled during the quarter.

The net interim earnings set out in the Specification were those earnings of the claimants earned during the quarters or portions of the quarters claimed, less expenses incurred in seeking work.

The net backpay of each claimant set forth in the Specification was determined by reducing the gross backpay by the net interim earnings of each claimant for each quarter or portions of each quarter claimed and by adding the quarters together, giving the total amount of backpay due each claimant, not including interest.

Recovery was sought for the net backpay of each claimant as well as interest in the amount of 6 percent to be computed on the basis of *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Joseph G. Norton, the compliance officer of the Board who had drawn the Specification, explained the formula, its application, and the computations contained in the Specification. His testimony was clear, forthright, and honest and the Trial Examiner was impressed that he was an ingenuous person, knew his business, and had drawn the Specification with great care and caution. Indeed the Trial Examiner is convinced that the testimony of Norton as well as the Specification reveal that doubts were resolved in favor of the Respondent. There is no question in the Trial Examiner's mind that the Specification is fairly drawn. Furthermore, the Respondent, for all practical purposes, conceded the correctness of the gross backpay figures[8] contained in the Specification.

The Trial Examiner finds that the formula employed by the General Counsel was fair and reasonable and that the General Counsel established a *prima facie* case for the amounts sought in the Specification.

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[8] In comparing the General Counsel's formula to the Respondent's proposed formula, in support of which no evidence was adduced, counsel for Respondent said,

> There are some differences to a greater or lesser extent in individual cases but, in general, the overall result was substantially the same. . . . We don't intend to waive any contention that the method adopted by the Board as compared to a realistic departmental method, was designed to achieve the highest backpay result and, as best we can determine, it was purely coincidental that the figures end up as they have and we emphasize, we did not discover this until after the answer was filed but we think the legal issue is framed and we just don't choose to litigate all these details of actual gross dollar amounts. Not net but gross dollar amounts which are similar in our computation and the Board's computation because we think that on balance that will achieve little. . . . So, we stick to our contentions about the formula but in saying this we understand you will, in all probability, adopt those gross figures.

Second: The Respondent contends that the supplemental backpay claims should be dismissed because of the unjustified delay of the Board in filing the Supplemental Backpay Specification and because of the General Counsel's refusal to produce evidence. As to the latter contention, the Board has answered it adversely to the Respondent in the Respondent's direct appeal to the Board. As to the former contention, the Supreme Court in the above-captioned *Rutter-Rex* case at 396 U.S. 258 has answered it adversely to the Respondent. The defense, of course, would not lie, in the cases of claimants Green, Haynes, Hicks, or Lewis, who by reason of alleged strike misconduct were not offered employment until 1970, and claimants Davis and Watford, who also were not offered employment until 1970.

While the Supreme Court thought it "deplorable" if the Respondent were hampered in the presentation of its defenses to the Backpay Specification by delay, it held that it was "even more deplorable" that innocent employees had to live for some years on reduced incomes as a combined result of the delay and the Respondent's illegal failure to reinstate them.

Of the Respondent, the United States Court of Appeals for the Fifth Circuit has said (399 F.2d 356) (after referring to the Respondent's confrontations with the Board):

> It convinces us, of course, that Rutter-Rex is not, and has not been, a babe in the woods, now about to be victimized for ignorance or inadvertent ineptitude in the field of employer-employee relations, as regulated by the National Labor Relations Act.

The court also said:

> The Company, experienced in labor disputes and represented by outstanding counsel, could not have possibly overlooked the plain command of the Court's decree that employees should be reinstated upon application and made whole for any loss of pay they might have suffered by refusal to reinstate.[9]

The Trial Examiner also found Respondent's counsel to be outstanding and surely capable of comprehending a long time ago Justice Marshall's suggestion that "[i]t may be that the company could have, through the courts, compelled earlier Board action." Justice Marshall was referring to Section 10(e)(A) of the Administrative Procedure Act, 5 U.S.C. 1009(e)(A) (1964, which provides that courts shall "compel agency action unlawfully withheld or unreasonably delayed." That learned Counsel did not try this procedure, if the Respondent were apprehensive of delay, seems to indicate that the Respondent accepted the delay and pursued a course which was best fitted to its antiunion needs. In any event, any discouragement of its employees' union activities which was caused by its withholding backpay payments for such a long period mitigated to the advantage of the Respondent, and its employees were left to wonder for many years whether their employer was obligated to fully comply with the Act and whether the Act really afforded them protection in the pursuit of their union activities. For the employees such a state was "even more deplorable."

In light of the Supreme Court's decision, with which the Trial Examiner is wholly in accord, the Trial Examiner finds that the Respondent's contention as set out above is without merit. Under the circumstances of this

[9] It is the latter part of this decree which the Respondent seeks now to avoid.

case fair play does not demand that the remedial policies of the Act be so lightly treated as to exonerate a convicted wrongdoer of the consequences of his misconduct. As a matter of public concern, it is better that the salutary purposes of the Act be accommodated.

The General Counsel's explanation for the delay is both reasonable and adequate:

> The Supplemental Backpay Specification in the instant case was not issued until November 30, 1970, because of the Respondent's refusal at all times to comply with either the Trial Examiner's Supplemental Decision in Backpay Proceeding or the Board's Supplemental Decision and Order in the initial Backpay Specification proceedings, whereby Respondent was required to pay certain amounts of backpay to the same claimants as in the instant proceeding and whose backpay was still occurring, until after the United States Court of Appeals for the Fifth Circuit issued its Supplemental Judgment on April 6, 1970; Respondent's failure or refusal to offer reinstatement to some of these claimants until as late as May 1970; and because of the intervening proceedings before the Board and Courts between the issuance of the initial Backpay Specification and the above-mentioned Supplemental Judgment of the Court on April 6, 1970. In addition, Respondent refused to make any of its records available for the purpose of computing the gross backpay in the Supplemental Backpay Specification, thereby causing additional time for preparation of the Supplemental Backpay Specification, as well as time spent for settlement purposes.

Third: In the recent case of *Fibreboard Paper Products Corporation*, 180 NLRB No. 33, the Board has reviewed

and summarized some of the guiding principles applicable to backpay cases:

"Willful loss of earnings is an affirmative defense, and the burden of proof is on the Respondent.[10] Once the General Counsel has shown the gross amount of backpay due, the burden is upon the employer to establish facts to negative or mitigate liability to a given employee.[11] And finally, 'any uncertainty is resolved against the wrongdoer whose conduct made certainty impossible.' "

"It is accepted by the Board and reviewing courts that a discriminatee is not entitled to back pay to the extent that he fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quit alterna-

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[10] The Board cites *N.L.R.B.* v. *Mooney Aircraft, Inc.*, 366 F.2d 809 (C.A. 5). In such case the court commented at 812:

> While the General Counsel has the burden of proving unlawful discrimination on the part of the employer, and hence that backpay is due, the employer usually has the burden of establishing affirmative defenses which would mitigate his liability. *N.L.R.B.* v. *Miami Coca-Cola Bottling Co., supra* [360 F.2d 569]; *N.L.R.B.* v. *Brown* & Root, Inc., 8 Cir. 1963, 311 F.2d 447. Among these affirmative defenses are the unavailability of jobs because of nondiscriminatory factors, the employees' willful loss of earnings, and employees' interim earnings to be deducted from the backpay award.
>
> * * * * * *
>
> The cases are unanimous that the Employer must establish these defenses by a preponderance of the evidence. *N.L.R.B.* v. *Miami Coca-Cola Bottling Co., supra*; *N.L.R.B.* v. *Mastro Plastics Corp.*, 2 Cir. 1965, 354, F.2d 170; *N.L.R.B.* v. *Brown & Root, Inc., supra.*

The Court of Appeals for the Fifth Circuit has said in the above-captioned *Rutter-Rex* case (399 F.2d 356):

> . . . backpay, as used in the applicable statute, includes moneys which it is reasonably found that an employee would actually have received in the absence of unlawful discrimination; that lack of available jobs is an affirmative defense, that the burden of establishing such a defense rests on the employer, and the burden likewise rests with an employer attempting to prove a former employee's failure to make reasonable search for other employment.

[11] See also *United States Air Conditioning Corporation*, 141 NLRB 1278, 1280, enfd. 336 F.2d 275 (C.A. 6).

tive employment without good reason." *N.L.R.B.* v. *Mastro Plastics Corporation*, 354 F.2d 170 (C.A. 2) fn. 3.

The test is whether the discriminatee has made reasonable efforts to find new employment which is substantially equivalent to his prior position. *American Manufacturing Co.*, 167 NLRB 520, 525. In this respect the duty imposed on the discriminatee to minimize his loss of earnings stems from "the healthy policy of promoting production and employment." See *Southern Silk Mills, Inc.*, 116 NLRB 769, 772. But this duty ". . . does not require success; it only requires an honest good faith effort. . . ." *N.L.R.B.* v. *Cashman Auto Co.*, 223 F.2d 832, 836 (C.A. 1).

In computing the backpay awards the Board endeavors to restore the employee to the *status quo* he would have enjoyed if he had not been discriminatorily discharged. *N.L.R.B. v. U. S. Air Conditioning Co.*, 336 F.2d 275, 277 (C.A. 6); *N.L.R.B.* v. *Robert Haws Company*, 403 F.2d 979 (C.A. 6).

> A discriminatee who has otherwise made reasonable efforts to seek out new employment is not required in each specific quarter to repeat job applications which from her past efforts she knows are foredoomed to futility in order to protect her claim of backpay for that particular quarter. Rather, the entire backpay period must be scrutinized to determine whether throughout that period there was, in the light of all surrounding circumstances, a reasonable continuing search such as to foreclose a finding of willful loss. [Cornwell Company, Inc., 171 NLRB No. 43.]

The Respondent's affirmative defenses other than those which were purely legal were supported primarily by cross-examination of the claimants. Since these defenses must

relate to the credibility of the claimants, the Trial Examiner carefully observed the demeanor of each witness as it related to the truthfulness of his or her testimony. In this endeavor the Trial Examiner was aided by the searching and exacting cross-examination of counsel for the Respondent. Weighing all factors the Trial Examiner has concluded that none of the claimants deliberately lied for the purpose of dishonestly obtaining backpay. This conclusion is fortified by the fact that, had the claimants lied about crucial matters, the depth and artfulness of Respondent's counsel's cross-examination in most cases would have wrung the truth from these unsophisticated and unlearned witnesses. While there may have been a few taradiddles, these did not reflect adversely on the witnesses' overall credibility as to the material matters in issue.

Each discriminatee's backpay claim will be examined in the light of the foregoing discussion, the whole record before the Trial Examiner, and the Respondent's affirmative defenses articulated in its answer and its memorandum to the Trial Examiner.

[The remainder of the Trial Examiner's Decision has not been reproduced, as it deals solely with the thirty-three individual claims to backpay, which the petitioner believes to be irrelevant to the instant petition. A copy of the full decision appears at page 58 of the appendix printed in the Fifth Circuit proceeding which appendix will be certified by the Clerk of the United States Court of Appeals for the Fifth Circuit and lodged with this Court.]

APPENDIX E
OPINION
SUPREME COURT OF THE UNITED STATES

No. 32.—October Term, 1969.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

National Labor Relations Board,
Petitioner,
v.
J. H. Rutter-Rex Manufacturing Company, Inc., et al.

[December 15, 1969]

Mr. Justice Marshall delivered the opinion of the Court.

This case presents the question whether, when an employer has improperly failed to reinstate striking employees, and the National Labor Relations Board has after considerable delay ordered backpay for those employees, a court of appeals may, on account of the delay, modify the Board's order to provide an early cutoff date for backpay. In the circumstances of this case, we hold such a modification to be an unwarranted interference with the Board's remedial power to implement the policies of the National Labor Relations Act.

I

The employees in question chose the Amalgamated Clothing Workers of America, AFL-CIO, as their bar-

gaining representative in January 1954. After three bargaining sessions between the union and the company, the employees went out on strike in April 1954. At that point and thereafter the company refused to bargain further with the union representatives. Charges of unfair labor practices, including a refusal to bargain in good faith, were filed against the company. In April 1955, while these charges were pending, the union terminated the strike and applied for the reinstatement of many of the strikers. The company reinstated some of these employees and failed to reinstate others.

In February 1956, the Board found that the company had indeed been guilty of an unlawful refusal to bargain. It ordered the company to offer reinstatement to all strikers who applied, and to "make such applicants whole for any loss of pay suffered by reason of the . . . refusal, if any, to reinstate them." *J. H. Rutter-Rex Mfg. Co.*, 115 NLRB 388, 391 (1956). As is apparently the Board's practice in reinstatement cases involving strikers, the order did not name the individuals covered, but left disputes over the details of reinstatement and backpay to the compliance stage of the proceedings. The Court of Appeals enforced the Board's order, *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 245 F. 2d 594 (C. A. 5th Cir. 1957), and entered its decree on August 19, 1957.

On August 21, 1957, the Board's regional office sent the company the standard letter describing compliance procedures, which included the following:

> "When you have fully complied with the affirmative terms of the decree and there are no violations of its negative provisions, you will be notified that the case has been closed. Until

> you receive such notice you will know that the case remains open for all purposes as awaiting compliance."

On November 7, 1957, the company wrote to the regional office stating that it had complied with "some of the provisions of the decree," and asking that the regional office bring "any instance of a failure to comply fully with the order" to the company's attention. The regional office did not answer this letter, and the company heard nothing until March 22, 1960, when a Board compliance officer notified the company that the case had been assigned to him, and requested payroll and other records necessary to determine the employment and backpay rights of employees.

On November 16, 1961, the regional office filed a 428-page backpay specification, alleging that the company owed more than $342,000 to some 207 strikers who had either not been reinstated within five days after applying, or who had never been reinstated, in violation of the board and court orders. The company applied to the Court of Appeals for a permanent stay of further action in the backpay proceedings, alleging that the Board had delayed improperly in issuing the specification. By affidavit, the Board explained that the delay was caused in part by the great complexity of the task of processing the claims of approximately 600 strikers, and in part by the extremely heavy caseload and severely limited staff which the New Orleans regional office experienced during the late 1950's. The Court of Appeals noted that the delay was regrettable, but denied the requested stay. *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 305 F. 2d 242 (C. A. 5th Cir. 1962).

After a lengthy hearing, a Trial Examiner denied backpay to 35 of the 207 claimants, and reduced the amount due to just over $160,000. He determined that each employee should receive net backpay, computed according to the Board's usual formula,[1] for the period running from five days after his application for reinstatement until the company made a complying offer. Where no offer was made, the backpay was to accrue through the last quarter of 1961, the quarter in which the specification was filed. His findings and recommendations were adopted with minor modifications by the Board on June 3, 1966. *J. H. Rutter-Rex Mfg. Co.*, 158 NLRB 1414 (1966). Both the Examiner and the Board considered and rejected the company's contention that the delay in issuing the specification should bar the backpay award, either in whole or in part.

On review, the Court of Appeals found that the Board had been guilty of "inordinate" delay, in violation of § 6(a) of the Administrative Procedure Act, 5 U. S. C. § 1005(a), and to the prejudice of the company, which had been "lulled into the belief that the Board was satisfied and that no further relief was to be expected." *J. H. Rutter-Rex Mfg. Co. v. NLRB*, 399 F 2d 356, 363 (C. A. 5th Cir. 1968). Arguing that the purpose of backpay awards is to "deter unfair labor practices," *Id.*, at 364, and believing that a substantial award of backpay would be sufficient to achieve such deterrent effect, the court modified the Board order to eliminate all backpay accruing after July 1, 1959, thus reducing the awards of some 37 strikers who had not yet received complying offers of reinstatement by that date. We granted certiorari to consider the propriety of this modi-

[1] *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 345 (1953).

fication,[2] 393 U. S. 1116 (1969), and we reverse the judgment below.

II

We start with the broad command of § 10(c) of the National Labor Relations Act, 29 U. S. C. § 160(c), that upon finding that an unfair labor practice has been committed, the Board shall order the violator "to take such affirmative action including reinstatement with or without back pay, as will effectuate the policies" of the Act. This Court has stated that the remedial power of the Board is "a broad discretionary one, subject to limited judicial review." *Fibreboard Corp. v. NLRB*, 379 U. S. 203, 216 (1964).

The legitimacy of backpay as a remedy for unlawful discharge or unlawful failure to reinstate is beyond dispute, *Mastro Plastics Corp. v. NLRB*, 350 U. S. 270, 278 (1956), and the purpose of the remedy is clear. "A back pay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice." *Nathanson v. NLRB*, 344 U. S. 25, 27 (1952). As with the Board's other remedies, the power to order backpay "is for the Board to wield, not for the courts." *NLRB v. Seven-Up Bottling Co.*, 344 U. S. 344, 346 (1953). "When the Board, 'in the exercise of its informed discretion,' makes an order of restoration by way of back pay, the order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be

[2] The Court of Appeals also reversed backpay awards as to 10 strikers in their entirety, finding the awards not supported by substantial evidence. 399 F.2d, at 365. Certiorari was not sought as to this modification of the Board's order.

said to effectuate the policies of the Act.'" *Id.*, *at* 346-347.

Here the Board ordered backpay through December 1961 for employees who had not yet received complying offers of reinstatement by that date. That order clearly falls within the general purpose of making the employees whole, and thus restoring the economic status quo which would have obtained but for the company's wrongful refusal to reinstate them. The employees encompassed by the order earned less during the relevant quarterly periods than they would have had they been reinstated in their old or substantially equivalent jobs with the company. Thus the Court of Appeals' modification, cutting off the accrual of backpay at the arbitrary date of July 1, 1959, left the employees who had not been reinstated by that date worse off than they would have been but for the company's wrongful action in refusing reinstatement. Either the company or the employees had to bear the cost of the Board's delay. The Board placed that cost upon the company, which had wrongfully failed to reinstate the employees. In an effort to discipline the Board for its delay, the court shifted part of that cost from the wrongdoing company to the innocent employees.

The Court of Appeals justified the modification as a proper balancing of the interests of the company, which it found was prejudiced in litigating the backpay claims by the Board's delay, and the interests of the employees in full restitution. It found statutory support for the company's position in what it took to be the Board's violation of its duty under the Administrative Procedure Act "to proceed with reasonable dispatch to conclude

any matter presented to it." 5 U. S. C. § 1005(a) (1964). Thus, the Court of Appeals reasoned, the case fell within the admonition that reviewing courts in labor cases not "rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB v. Brown*, 380 U. S. 278, 291 (1965).

Assuming without deciding that the delay in issuing the specification did violate the Board's duty of prompt action under the Administrative Procedure Act, it does not follow that enforcement of the full backpay remedy was an abuse of the Board's discretion. Wronged employees are at least as much injured by the Board's delay in collecting their backpay as is the wrongdoing employer. In view of "the economic hardship caused by many years of undeservedly substandard earnings," lengthy delays "must render the back pay award a wholly inadequate and unsatisfactory remedy" to the employees for the company's refusal to reinstate them. *NLRB v. Mastro Plastics Corp.*, 354 F. 2d 170, 180 (C. A. 2d Cir. 1965). This Court has held before that the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers. *NLRB v. Electric Cleaner Co.*, 315 U. S. 685, 698 (1942); *Labor Board v. Katz*, 369 U. S. 736, 748 n. 16 (1962).

The Court of Appeals reasoned further that the purpose of the backpay remedy is deterrence of unfair labor practices, and that the substantial backpay award which it enforced would sufficiently serve that deterrent purposes. But the Board could properly conclude that

backpay is not only punishment for an unfair labor practice, but is also a remedy designed to restore, so far as possible, the status quo which would have obtained but for the wrongful act. Cf. *Phelps Dodge Corp. v. NLRB*, 313 U. S. 177, 194 (1941).

Finally, the Court of Appeals reasoned that the company was "lulled into the belief that the Board was satisfied and that no further action was to be expected." 399 F. 2d at 363. We need not decide whether this sort of estoppel argument would justify a court in reducing a backpay award, for no estoppel appears in this case. The Board clearly informed the company that this case would remain open as awaiting compliance until the company received a notice that the case was closed. No such closing notice was ever given. As the Court of Appeals itself stated, the company's subsequent letter asking that violations of the order be called to its attention "could not shift or avoid its duty of compliance." *Ibid.*

We do not mean that delay in the administrative process is other than deplorable. It is deplorable if, as the Court of Appeals thought, the company was hampered in the presentation of its defenses to the backpay specification by the delay. It is even more deplorable if, as seems clear, innocent employees had to live for some years on reduced incomes as a combined result of the delay and the company's illegal failure to reinstate them. It may be that the company could have, through the courts, compelled earlier Board action.[3]

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[3] Section 10(e)(A) of the Administrative Procedure Act, 5 U.S.C. 1009(e)(A) (1964), provides the courts shall "compel agency action unlawfully withheld or unreasonably delayed."

But the Court of Appeals exceeded the narrow scope of review provided for the Board's remedial orders when it shifted the cost of the delay from the company to the employees in this case.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 32.—October Term, 1969

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

National Labor Relations Board, Petitioner,

v.

J. H. Rutter-Rex Manufacturing Company, Inc., et al.

[December 15, 1969]

Mr. Justice Douglas, with whom The Chief Justice and Mr. Justice Harlan concur, dissenting.

Universal Camera Corp. v. NLRB, 340 U. S. 474, requires a dismissal of the writ of certiorari.

To start with, the Board is allowed a wide field of discretion over awards of back pay against a company found to have committed an unfair labor practice As the Court said in *Phelps Dodge Corp. v. NLRB*, 313 U. S. 177, 198:

> "The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations."

Thus the employees in this case have no automatic "right" to any award of back pay.

The *Universal Camera* case concerned the scope of judicial review of orders of the Board. Prior to that decision, many courts had conceived their function of review as an extremely narrow one; some courts looked only for evidence which, when viewed in isolation, substantiated the Board's findings. Congress registered its dissatisfaction with this restricted scope of review by stating the proper test in the Taft-Hartley Act as one of "substantial evidence on the record considered as a whole." 61 Stat. 148, 29 U. S. C. § 160(e) This meant that the courts of appeals were to "assume more responsbility for the reasonableness and fairness of Labor Board decisions" than had been the practice of many of these courts in the past. 340 U. S., at 490.

The impact of this decision was to vest the courts of appeals with general supervisory responsibility over Board decisions and orders. Accordingly, the role of this Court was to be an extremely limited one. The Court in *Universal Camera* put it this way:

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Court of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Id.*, at 490-491.

The problem in the present case is one of working out

the equities of a back-pay order. Because the Board's delay in initiating compliance proceedings with respect to its original order was deemed unreasonable, the Court of Appeals saw fit to modify the terms of that order. The impact of the specific facts relating to the Board's and the company's actions in this case were taken into account by the Court of Appeals in reviewing the terms of the back-pay order. It arrived at its judgment as an exercise of its responsibility "for assuring that the Board keeps within reasonable bounds" (*Id.*, at 490) in a subject area that necessarily involves "diverse, complicated situations."

Casting the issue as one of "law" rather than as one of "fact" does not conceal the substantial departure in this case from the learning of *Universal Camera:* that the courts of appeals, and not this Court, are the watchdogs of the Board.

I would dismiss the writ as improvidently granted.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1501

J. H. RUTTER REX MANUFACTURING COMPANY, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. In June 1957, the court of appeals sustained the Board's finding that the Company had violated its statutory duty to bargain with the Union and that this action had prolonged the employees' valid strike and transformed it into an unfair labor practice strike. The court entered a decree which directed the Company to reinstate the unfair labor practice strikers upon application, and to make them whole for any loss of earnings resulting from its failure to tender such reinstatement. 245 F. 2d 594.

In November 1961, the Board issued a specification setting forth the backpay claims for 207 employees.

The Board entered a supplemental order in June of 1966, which determined backpay due to 172 strikers and denied backpay to 36 others. 158 NLRB 1414. The court of appeals held that backpay ceased to accrue as of July 30, 1959, because of the Board's delay in issuing the specification. 399 F. 2d 356. This Court reversed, holding that "the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." 396 U.S. 258, 265 (Pet. App. 80A).

In the present second backpay proceeding, following this Court's decision, the Board ordered the Company to pay $53,078, plus interest, to 33 unfair labor practice strikers whom it had still not reinstated at the time of the initial backpay specification. The Board refused to deny the additional backpay claims because of the General Counsel's delay in issuing the second backpay specification.[1] The Board rejected the Company's contention that it should have been given access to the General Counsel's investigatory files, noting that the Company received all statements that could be construed as coming within the scope of the Board's "*Jencks* rule,"[2] that the backpay specification provided the names of the claimants' interim employers and earnings, that social security records and other earnings documentation were also produced, and that the claimants themselves were made available for cross-examination. The Board also rejected the Company's contention that the individual claimants had not made reasonable efforts to mitigate their loss of earnings. (Pet. App. 50A-73A.)

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[1] It was issued on November 30, 1970 (Pet. App. 4A).

[2] Section 102.118(b), (d) of the Board's Rules and Regulations, 29 C.F.R. 102.118(b), (d). See n. 3 *infra*, p. 4.

The court of appeals sustained the Board's decision and enforced its order except with respect to the claim of one employee. The court concluded that the Company was entitled to a new hearing on the claim of this employee, since the Board had erred in refusing to permit its former compliance officer to refer to notes in the Board's files for the purpose of refreshing his recollection as to an offer of reinstatement which the Company allegedly made to that employee. (Pet. App. 1A-45A.)

2. The Company contends (Pet. 7-8) that the Board and the court of appeals did not adequately consider the effect of the Board's delay in the instant case because of their belief that this Court's prior decision foreclosed the issue. As the court of appeals noted, however, the Trial Examiner ordered the General Counsel to explain the delay in issuing the second specification and "[o]nly after the examiner considered and accepted the explanation was the delay factor rejected" (Pet. App. 6A). Moreover, the court of appeals fully explained its reasons for concluding that the Board had acted "wisely" in waiting until after the first backpay case was finished before issuing the second specification.

The court noted that, if this Court had accepted the earlier decision limiting the Company's backpay liability, the second backpay specification "would have been of dubious legality" (Pet. App. 7A). It noted further that, since the Company did not offer reinstatement to some of the claimants until May 1970, if the Board had held a second hearing prior to their reinstatement, it would have been necessary to hold a third hearing after their backpay periods had been tolled by reinstatement offers (Pet. App. 7A-8A). In these circumstances, the court of appeals correctly concluded that "it would be both unjust and inconsistent with the Supreme Court's

decision in *Rutter Rex I* to require that the otherwise entitled claimants pay the price for the delay, which was in no way caused by them" (Pet. App. 8A).

3. The Company argues (Pet. 7-13) that the court of appeals created a new evidentiary privilege for the Board's investigatory files. The files contained informal, handwritten notes made by Board agents during and after interviews with the claimants.[3] The court of appeals properly held that such materials were privileged from discovery under "the established evidentiary privilege that accords qualified protection to the informal deliberations of all prosecutorial agencies and branches of government" (Pet. App. 19A). See, *e.g., Hickman* v. *Taylor*, 329 U.S. 495, 507-514; *United States* v. *Morgan*, 313 U.S. 409, 422; *National Labor Relations Board* v. *Clement Brothers Company*, 407 F. 2d 1027, 1030-1031 (C.A. 5); *Davis* v. *Braswell Motor Freight Lines*, 363 F. 2d 600, 603-605 (C.A. 5); *Intertype Company* v. *National Labor Relations Board*, 401 F. 2d 41, 44-45 (C.A. 4), certiorari denied, 393 U.S. 1049; *Kayser-Roth Hosiery Co.* v. *National Labor Relations Board*, 447 F. 2d 396, 399 (C.A. 6). Moreover, to impeach a witness with such materials, which contain " 'someone's version of what somebody else said' " (*Securities & Exchange Commission* v. *R. A. Holman & Co.*, 34 F.R.D. 139, 140 (S.D. N.Y.)), would seriously impede the fact-finding process. See *Palermo* v. *United States*, 360 U.S. 343, 349-353 ("grossly unfair" to impeach a witness using statements which were not his own but rather "the

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[3] These notes were not the kind of verbatim account of an interview which would be producible under the Jencks Act, 18 U.S.C. 3500, or Section 102.118 of the Board's Rules (Pet. App. 19A, n. 12.

product of the investigator's selection, interpretations and interpolations").

The decision below does not conflict with *National Labor Relations Board* v. *Capitol Fish Company*, 294 F. 2d 868 (C.A. 5), and *General Engineering, Inc.* v. *National Labor Relations Board*, 341 F. 2d 367 (C.A. 9). As the court below noted (Pet. App. 18A-19A), in both of those cases the Board sought to justify its refusal to produce the requested documents solely on the ground that permission had not been granted under Section 102.118(a) of the Board's Rules, 29 C.F.R. 102.118(a). Here, on the other hand, the refusal was grounded on a recognized evidentiary privilege.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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PETER G. NASH,
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JUNE 1973.